No. 22659

In the United States Court of Appeals for the Ninth Circuit

JOHN C. WAGNER, ROBERT L. WAGNER and PETER C. UNGER, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Oregon

BRIEF FOR APPELLEE

SIDNEY I. LEZAK,
United States Attorney

Of Counsel:

JOHN N. FEGAN,
ARTHUR F. MATHEWS,
BERTON H. FINKELSTEIN,
DAVID J. LEVENSON,
Attorneys,
United States Securities and Exchange Commission,
Washington, D. C.

TABLE OF CONTENTS

TABLE OF CASES

Cases—Continued Page

Cases—Continued Page

Cases—Continued Page

Cases—Continued Page

In the United States Court of Appeals for the Ninth Circuit

No. 22680

JOHN C. WAGNER, ROBERT L. WAGNER and PETER C. UNGER, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Oregon

BRIEF FOR APPELLEE

STATUTES INVOLVED

See Appendix.

PRELIMINARY STATEMENT

John Wagner, Robert Wagner and Peter Unger appeal from judgments of conviction entered in the United States District Court for the District of Oregon on August 4, 1967 after a fourteen-day trial commencing on July 18, 1967 before the Honorable Robert C. Belloni and a jury.

Indictment 66 Cr. 265 was filed on December 7, 1966, naming appellants, John Wagner, Robert Wagner, Peter Unger and eight other defendants in various of the seven-

teen counts charging: conspiracy to violate the anti-fraud provisions of the Securities Act of 1933, and the Mail Fraud Statute (Count I); fraud in the sale of securities (Counts II through VI); mail fraud (Counts VII through XIII); conspiracy to defraud agencies of the United States, to make false statements, and to transport converted property interstate (Count XIV); making false statements to the government (Count XV); and interstate transportation of converted property (Counts XVI and XVII). Count XII was dismissed prior to trial, and Counts IV and VII were dismissed at the conclusion of the government's case. In addition, certain language of the indictment was stricken at the conclusion of the government's case and again prior to submission of the case to the jury.

John Wagner was named in all Counts of the indictment. Robert Wagner was named in Counts I and XIV. Peter Unger was named in Count I. Prior to trial the indictment was dismissed against William A. Shubin on the government's motion, and Alvin R. Stewart entered a plea of nolo contendere. After commencement of trial, the indictment was dismissed on the government's motion against Andrew J. Kosieris and the three corporations, Golden Rule Realty and Development Co., Inc., GRR Development, Inc., and Pioneer Mortgage Bankers. During the second week of trial, Gordon Z. Jongeward and Colman Carl Christensen entered pleas of nolo contendere.

John Wagner was convicted on each of the remaining fourteen counts of the indictment, and was sentenced to a total of ten years imprisonment, followed by five years' probation, and fined a total of $30,000, as follows: five years' imprisonment on each of Counts I and XIV, to run concurrently; five years' imprisonment on each of Counts VIII, IX, X, XI and XIII, to run concurrently with each other and consecutively with the sentence imposed on Counts I and XIV; five years' probation on Count XV, to run consecutively with the sentence imposed on Counts I, VIII, IX, X, XI, XIII and XIV; and $5,000 fines on each of Counts II, III, V, VI, XVI and XVII. Robert Wagner was convicted on Count I and acquitted on Count XIV, and sentenced to one year's imprisonment and fined $10,000.

Peter Unger was convicted on Count I and sentenced to four years' imprisonment.

All three appellants are presently at large on bail pending the determination of this appeal.

SUMMARY OF CASE

Count I of the indictment charged every defendant, including John Wagner, Peter Unger, and Robert Wagner, with conspiracy (18 U.S.C. 371) to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. 77q (a)), and the Mail Fraud Statute (18 U.S.C. 1341). This Count, as to which each of the appellants was found guilty, charged that they engaged in a scheme to defraud owners of various real estate interests located in Oregon, California, Hawaii, Arizona, and other Western states during the period from March 1963 through December 1966. The essence of the scheme charged in Count I was as follows: The defendants contrived and executed a series of deceptive real estate transactions acquiring raw land of little value for the purpose and with the intent of creating worthless and spurious promissory notes and trust deeds. They shunted the land so acquired to one another and to associates and nominees in a manner designed to inflate the purported value of such properties, and to enable them to create additional worthless trust deeds and promissory notes. The defendants then used these worthless securities in the acquisition of income-producing properties or valuable goods and services from defrauded victims by deceiving such victims into believing that the securities received in exchange for the property interests were bona fide and valuable.

As a part of the scheme, the defendants misrepresented to victims that the persons issuing the promissory notes and trust deeds had made substantial payments and possessed substantial equities in the properties covered by the trust deeds, and that interest and principal payments on the promissory notes were current and would be hon-

ored in the future as such payments became due. The defendants intentionally concealed from the defrauded persons that such promissory notes and trust deeds were of little or no value, that the persons issuing them had made no cash down payments and had little or no equities therein, that the promissory notes were delinquent and in default as to both interest and principal payments due, and that payments endorsed on certain of such notes were ficticious.

The defendants carried out a substantial portion of their scheme to defraud through three corporate defendants, Golden Rule Realty and Development Co., Inc. (Golden Rule), GRR Development, Inc. (GRR), and Pioneer Mortgage Bankers (Pioneer). In this connection the defendants gave promissory notes of Golden Rule, GRR and Pioneer to the persons to be defrauded in full or partial payment for real property interests, and falsely represented that such corporations had the financial resources to redeem the notes, would assume all obligations on the property, and would preserve and protect the seller's equity, when in fact the defendants well knew that they had neither the financial ability nor the intention of so doing. After acquiring such properties, the defendants followed a pattern of "milking" or "skimming" the revenues from the operations of the properties, including current and advance rentals from tenants and the sale of personal property thereon, for their own personal use and benefit while defaulting on their obligations to pay mortgages, taxes, labor and other operating expenses on the properties.

In order to create and portray the illusion of wealth, success, and respectability, the defendants prepared obviously inflated, false and misleading financial statements, which falsely included multi-million dollar assets in cash, notes receivable, and real property. These financial statements were circulated and disseminated in order not only to acquire additional properties, but also to obtain loans and establish credit ratings.

Counts II through XIII, as to which John Wagner was found guilty, realleged the fraudulent scheme described

and contained in Count I, and charged separate substantive violations of the anti-fraud provisions of the Securities Act (Counts II through VI) and of the Mail Fraud Statute (Counts VII through XIII).

Count XIV charged John Wagner, Robert Wagner and other defendants, with conspiracy to defraud agencies of the United States (18 U.S.C. 371), to make false statements within the jurisdiction of agencies of the United States (18 U.S.C. 1001), and to transport in interstate commerce monies fraudulently obtained and property fraudulently converted (18 U.S.C. 2314). Count XIV alleged that John Wagner and others conspired to acquire properties, including the Hollywood Towne House, and to "milk" these properties of all available income and revenues by collecting cash receivables, current rentals, and advance rentals on pre-paid long-term leases solicited from tenants in exchange for substantial discounts; to strip the properties by selling inventories and other assets; and then to convert such proceeds to their own use and benefit while defaulting on their obligations to make payments on mortgages insured or owned by federal agencies and to pay taxes, labor and other operating expenses on the properties. In furtherance of this fraudulent scheme, the defendants obtained cashiers' and travelers' checks and other negotiable instruments made payable to the defendants and their nominees, and thereafter transported such monies in interstate commerce knowing such monies had been stolen, converted and obtained by fraud. After acquiring possession and control of these properties, the defendants agreed to ignore and violate government regulations, mortgage agreements, and regulatory and modification agreements governing these properties, ignored and refused demands from federal agencies for required monthly income reports; falsified and concealed income disbursements in reports furnished to federal agencies; and permitted the mortgages to fall into default and be foreclosed, thereby requiring the government to assume liability thereunder.

Count XV, of which John Wagner was found guilty, charged that he knowingly made false statements in a doc-

ument, "Monthly Report for Establishing Net Income," for the Hollywood Towne House, submitted to the Federal Housing Administration. The false statements included the matters of rent collections, advance rentals paid, and cash receipts and disbursements for the month of December 1965.

Counts XVI and XVII, as to which John Wagner was found guilty, charged that he and another defendant transported personal property and monies in interstate commerce knowing that such property and monies had been stolen, converted and obtained by fraud from the Hollywood Towne House and other real properties.

COUNTER STATEMENT OF THE CASE

At the trial voluminous evidence was adduced in connection with well over 40 complex real estate transactions that the defendants consummated in furtherance of their scheme to defraud. Since both Peter Unger and Robert Wagner challenge at length the sufficiency of the evidence to sustain their convictions on Count I, and since they fail to mention their activities with respect to many of such transactions and distort their roles with respect to those transactions which they do mention in their briefs, the government feels compelled to provide a comprehensive counter statement of the case.

A. Acquisition of Elsinore Properties

In 1963, John Wagner and Peter Unger began acquiring raw and undeveloped acreage around Elsinore, California by making purchase offers at attractive prices. If these purchase offers were accepted, they made a small or no cash down payment; they gave promissory notes and trust deeds which they had no intention of honoring. Thereafter, the land thus acquired was shunted by John Wagner and Peter Unger to one another or to associates, inflating the purported value of the properties and creating even more worthless trust deeds and promissory notes which were subsequently used in the acquisition of income-producing

properties in other areas. The Elsinore properties acquired in this scheme were the Paonessa, Rupard and Evans Tracts.

Paonessa Tract

In April 1963, Peter Unger and John Wagner acquired a 700-acre "rock ranch" located along a desolate and rocky canyon (Tr. 409)[1] from Raymond B. Paonessa. Paonessa had acquired the property in 1940 for $1500. Although Peter Unger and John Wagner represented themselves as wealthy and successful businessmen, and originally offered Paonessa $90,000 with a $20,000 cash down payment, all Paonessa finally received after a six month delay was about $4,200 plus trust deeds (Tr. 309, 332, 338; GX 54-A). In June 1964 Paonessa commenced a foreclosure action because of default in payments on the trust deeds (Tr. 339). During 1963 and 1964, after they had divided the tract into 48 parcels, John Wagner and Peter Unger shunted the parcels to one another, to their wives, and to an associate (Tr. 339). This complex shunting operation was accomplished as follows: On November 6, 1963 John Wagner conveyed an undivided one-half interest in 28 parcels to his wife Marjorie, and an undivided one-half interest in those same parcels to Peter Unger's wife Rosa (Doc. #119100);[2] on May 22, 1964 Rosa Unger, by Peter Unger, her attorney-in-fact, conveyed her interest in these and other parcels to Marjorie Wagner (Doc. #63617); on October 29, 1964 Marjorie Wagner, by John Wagner her attorney-in-fact, conveyed these parcels back to Rosa Unger (Doc. #131828); and on November 28, 1964 John and Marjorie Wagner again conveyed these parcels to Rosa Unger (Doc. #142847). Finally, on January 15,

[1] References to pages of the transcript of proceedings at trial are designated "Tr. ——." References to pages of the transcript of proceedings prior to trial are designated "Pre-Tr. ——," with the date. References to government exhibits are designated by "GX ——." References to the transcript record of the Clerk of Court are designated "C.T. ——."

[2] References to recorded documents are designated by "Doc. #——."

1965, Peter and Rosa Unger issued separate $7,500 promissory notes secured by trust deeds on each parcel to John Wagner, a total of more than $100,000 (Tr. 1585, 2342-43). On October 18, 1963, John Wagner conveyed 16 parcels of the Paonessa trace to Garth W. Slate, a retired army sergeant who was managing a motel for him and whose only income was a $160 monthly pension (Tr. 291, GX 274-D; Doc. #115341). Slate executed trust deeds and promissory notes for $7,500 on each parcel for a total of $120,000 (GX 274-D; Docs. #115341, 120649). Slate testified that he paid nothing down and did not intend to make any payments on his trust deeds and promissory notes, and that the purpose of the transaction was to have something to trade with (Tr. 296). He further testified that Peter Unger accompanied John Wagner when the deal was discussed.

Rupard Tract

Also during 1963, John Wagner and Peter Unger acquired the 96-acre Rupard Tract,[3] following a course of conduct similar to that involved in their acquisition of the Paonessa Tract. This time, John Wagner represented himself to Rupard as having made a lot of money in South America which he had sent to Switzerland for safekeeping (Tr. 839). Peter Unger, acting as John Wagner's agent, purchased the tract for $1,250 an acre, a total of $120,000 (Tr. 841). The tract was divided into 10 parcels, and the Rupards were given promissory notes ranging from approximately $3,800 to $30,000 which were secured by trust deeds on each parcel (GX 268-B, 277-A). John Wagner and Peter Unger defaulted on payments and a formal notice of default was filed on November 6, 1964. On April 20, 1965, at the Tustee's sale, John Wagner partly was foreclosed of any interest in the parcels (Tr. 827-29; GX 300A-1). In order to create the appearance of development so that he could borrow $40,000 to $50,000 on some of the

[3] The Rupard Tract is often referred to as the Elsinore Land Agency Tract because the parcels in these trust deeds were described by reference to 25-foot lots on an old and unrecorded subdivision map known by that name.

parcels, John Wagner had roads cut into the Rupard tract (Tr. 367-68). All interest on the parcels on which he had borrowed was conveyed out or foreclosed by the Trustee's sale on July 21, 1965 (GX 279B-1, 277A; Doc. #64075; GX 281G-1, Doc. #74076). Once again, as with the Paonessa Tract, John Wagner and Peter Unger shunted the Rupard Tract parcels to and from one another and their wives, with Peter Unger finally executing a series of $1250 promissory notes secured by trust deeds to John Wagner in November 1964 (GX 268-B, 277-A; Tr. 2343). These conveyances and reconveyances inflated the purported value of the property, which was thereafter carried on a balance sheet of John Wagner at the incredible value of $6,525,000 (GX 42-E; Tr. 840).[4]

Evans Tract

In 1950 Carl Evans acquired a 10-acre tract of land in Elsinore (part of an old plot known as the Mutual Benefit Tract) for cash and labor totaling $1,000 (Tr. 216). In 1963, shortly after he was offered $3,000 for the property, Evans received a long-distance telephone call from Peter Unger, who said his client John Wagner would pay him $7,500 for the land, with $1,500 cash down and the balance in semi-annual payments secured by a trust deed (Tr. 220-23). Pursuant to Peter Unger's instructions, Evans executed a grant deed giving "free and clear" title to John Wagner, and mailed it to Peter Unger. The deed was recorded on December 11, 1963 (GX 274-B, Doc. #130762), but, as with the Paonessa and Rupard transactions, Evans never received any payments, although he did receive confusing and evasive correspondence for several months (Tr. 236, 240). In 1964, John Wagner and Peter Unger shunted parcels of the Evans tract to one another, to their wives or to associates, with John Wagner conveying blocks of lots to Peter Unger's wife, to a Canadian named Peter

[4] Similarly, at a later date, Stewart and Golden Rule created $400,000 in trust deeds on the Rupard Tract (Tr. 756; GX 23-H, 23-D, 23-I to 23-CC), which was then listed as a $400,000 "asset" on the corporation's balance sheets (GX 312-B, 160-C).

Cristall, who was then staying at Peter Unger's hotel, and to a real estate broker named D. D. Vance, in exchange for purchase money notes and trust deeds totaling $63,000 (Tr. 382-86). These were later used by defendants to purchase properties, but no payments were ever made by the obligors on these notes and trust deeds.

B. Acquisition of Los Angeles Area Properties

As a result of their acquisition of properties in the Elsinore area in 1963 and 1964, John Wagner and Peter Unger built up a large inventory of worthless promissory notes and trust deeds. Through grossly exaggerated financial statements based thereon, they portrayed themselves as wealthy and successful real estate entrepreneurs. With this portfolio of valueless paper they proceeded to the Los Angeles area in November 1964 to implement their plan to acquire and "milk" income-producing properties.

Lishner Properties

Arthur H. Lishner was having difficulty marketing his three luxury residences located in Beverly Hills, and was unable to obtain "take-out" loans to pay off his interim financing (Tr. 244). In November 1964, John Wagner, representing himself as extremely wealthy, showed Lishner clippings about the "real estate boom" in Elsinore and told him that he (Wagner) would have no trouble getting loans on the houses (Tr. 245-46, 249). John Wagner acquired grant deeds to these properties, which he immediately recorded, purportedly to facilitate his getting loans, by representing to Lishner that he would assume all obligations and by giving him as "consideration" six $7,500 promissory notes executed by Slate and secured by trust deeds on Paonessa Tract parcels (Tr. 284). John Wagner told Lishner that Slate, the obligor, was a retired army colonel, and showed him a payment book which falsely reflected current monthly payments on each note (GX 339-A). The transaction was placed in escrow. John Wagner moved into one of the houses after representing that he was going to buy one for his son and that Peter Unger,

"a man of great affluence," was going to buy the other (Tr. 250). Lishner had his attorney write to John Wagner to confirm the agreement, and to Slate to confirm his payment record (GX 944; Tr. 276). Slate's first response was ambiguous and uninformative (GX 94-F; Tr. 271). Four subsequent letters went unanswered. In February 1965, at a time when Lishner had been under increasing pressure from banks to pay off his loans, Peter Unger contacted him and represented that he was going to take over in place of John Wagner and close the escrow (Tr. 256). At that time, Peter Unger had been living in one of the houses and had leased and collected $300 monthly rentals on each of the other two houses (Tr. 261). Peter Unger never completed the escrow and Slate, who was not a former army colonel but a former army sergeant receiving a $160 monthly pension never made any payments nor did he ever intend to make such payments with respect to the trust deed arrangement he had entered into with John Wagner (Tr. 262, 283, 291, 294, 296). As a result, the banks foreclosed on the properties and Lishner, the defrauded seller, lost his houses.

Rubel Transaction

During the same period, John Wagner, representing to Rauel Rubel, a furniture dealer, that he had invested all the money from the sale of his South American steel mill in real estate, offered to trade Elsinore properties for approximately $8,700 worth of Rubel's furniture for the Lishner houses he and his son were then occupying (Tr. 482). Rubel delivered the furniture but never got John Wagner's worthless deed to title to Elsinore properties. Rubel was never paid for his furniture. When he went to reposses the furniture, both the furniture and John Wagner were gone (Tr. 487).

C. Acquisition of Pismo Beach, Arroyo Grande and Santa Maria, California Properties

In late 1964, at about the same time they were operating in Beverly Hills, John Wagner and Peter Unger, with their

inventory of worthless promissory notes and trust deeds and their false financial statements, moved to another area of California, namely Pismo Beach, Arroyo Grande and Santa Maria. John Wagner, with Peter Unger as his agent appeared in the offices of Golden Rule, a real estate business operated by defendants Christensen and Jongeward (Tr. 587). Again playing the role of a millionaire interested in acquiring large acreage, John Wagner showed Christensen and Jongeward a balance sheet indicating his net worth at several million dollars (Tr. 749). Shortly thereafter, Christensen and Jongeward were arranging real estate deals for John Wagner and Peter Unger financed with the worthless promissory notes and trust deeds.

Harris Properties

In December 1964, John Wagner acquired a group of income-producing duplex and triplex properties from Ellis Harris by agreeing to assume substantial mortgage payments and by assigning to him nine of the $650 promissory notes and trust deeds executed by Vance to John Wagner on the Evans Tract parcels (Tr. 45; GX 273-A, 273-J; Docs. #151694, 151970 and 16468). Harris was falsely told that payments on the trust deeds were current and that the parcels were being developed. (Tr. 32, 45) This deal was arranged by Christensen, who introduced John Wagner to the Harrises as a wealthy and well-known developer (Tr. 30). Once again, as with their other acquisitions, John Wagner and Peter Unger shunted the duplex and triplex properties to one another in a confusing series of transactions, generating more trust deeds and constantly inflating the purported value of the properties. Unknown to Harris, the grantee in the deeds signed by Harris was changed from John Wagner to Peter Unger (Tr. 37; GX 109-1, 109-X, 109-DD). Peter Unger then deeded the properties back to John Wagner (Tr. 40-42; GX 109-J, 109-Z, 109-FF), who issued second trust deeds to Peter Unger (Tr. 43; GX 109-HH, 109-BB, 11C, 11D, 11N). Peter Unger admitted that he received an $18,000 trust

deed on the Harris duplexes from John Wagner, and that he then discounted it for $7,500 (Tr. 2417).

Harris and Christensen had co-owned an apartment building known as the Harbor Lights, and Harris had recently sold his 65% interest in that property to Christensen for cash and an $8,000 promissory note (Tr. 55, 83). In arranging the sale of the Harris duplexes and triplexes, Christensen told Harris that he had sold the Harbor Lights apartments to John Wagner (Tr. 30). However, Christensen had conveyed title to the Harbor Lights to Peter Unger, who then conveyed title to John Wagner in exchange for a $45,000 second trust deed (Tr. 56-57; GX 109-G). Thereafter, John Wagner listed the Harbor Lights on his financial statement at a value of $240,000 and showed no liability for the mortgage payments or trust deed obligations he had assumed (Tr. 60; GX 327B, 327C). John Wagner collected approximately $1,400 monthly in rentals on the Harris duplexes and triplexes, but did not pay any of the properties' outstanding obligations. Vance, the obligor on the trust deeds given in payment to acquire the properties, made no payments and never answered Harris' inquiries (Tr. 48-49). This resulted in a bank foreclosure action with Harris losing his equities in the properties (Tr. 58, 116).

Shorts Property

Additional property was acquired with John Wagner and Peter Unger's portfolio of worthless Elsinore trust deeds and promissory notes from an elderly couple, Charles H. Shorts and his wife. Golden Rule salesman, and defendant, Stewart contacted the Shorts to arrange a deal involving the sale of their Blue Seven Motel at Pismo Beach, which was heavily encumbered by first and second trust deeds, and their subsequent purchase of a house with the proceeds (Tr. 138-140). Stewart represented to the Shorts that John Wagner, now a purported millionaire land speculator from Los Angeles, would pay them for their interest in the Motel with trust deeds which were "good as gold," that John Wagner would assume all obligations and that

they could then use the trust deeds to buy a house (Tr. 140). In exchange for the deed to the Motel, John Wagner assigned to the Shorts eight of the $1,250 trust deeds which Peter Unger had issued to him on the Evans Tract parcels, after having assured Stewart that payments by Peter Unger were current (Tr. 144, 750). Thereafter, although John Wagner, through his son, collected the Motel's receipts of about $420 a month, he did not make the required mortgage payments with the result that the Motel mortgage was foreclosed (Tr. 147). Peter Unger made no payments on the Evans Tract trust deeds given by John Wagner to the Shorts, and never answered the Short's letter. In addition, Stewart had arranged for the Shorts to purchase a house in Oceano. John Wagner had acquired this house along with four other properties in the Arroyo Grande area from Christensen and Jongeward in March 1965 by agreeing to assume the outstanding first mortgage obligations on each and by giving them promissory notes and trust deeds in payment for their equities (Tr. 186-90; GX 223-A, 331-A, 331-B).[5] Before the escrow which had been opened for the sale to Shorts could close, the bank foreclosed on the house because of John Wagner's default in mortgage payments, despite two warning letters from the escrow agent (Tr. 147, 183, 184, 199, 205).

Smith Property

In January 1965, Christensen and Jongeward attempted to acquire another income-producing property, a resort motel in Oceano from William B. Smith for $100,000 in the Evans Tract trust deeds which Peter Unger had issued to John Wagner (Tr. 161; GX 42-A to 42-G). Smith was told that Peter Unger's trust deeds would be backed by John Wagner, who had lots of money and who was a joint-venturer with him on the project (Tr. 172). Smith was given personal balance sheets of John Wagner which

---

[5] These promissory notes and trust deeds appeared as assets on GRR's June 1, 1965 balance sheet (GX-59-A), even though all first mortgages were then in default and were eventually foreclosed (GX 340-A; Tr. 199).

showed his net worth to be more than $20,000,000 (GX 42-E, 42-H; Tr. 161-62).[6] The attempted acquisition was unsuccessful when Smith's investigation of the Evans Tract revealed that what Christensen had represented as lake-front property was in reality unimproved and desolate land (Tr. 164).

D. Acquisition of Elko, Nevada Property—Golden Rule Realty and Development Co., Inc.

In early 1965, Golden Rule became a vehicle for further implementation of the fraudulent scheme to execute deceptive real estate transactions using the valueless trust deeds and promissory notes created by John Wagner and Peter Unger in their acquisition of the Elsinore properties. Through Golden Rule, the defendants generated additional spurious paper for use in the acquisition of more properties and in the creation of false financial statements. Thus, in February 1965, John Wagner joined Christensen and Jongeward as one-third owner and Chairman of the Board of Golden Rule (Tr. 2160-62).

Ruby View Trailer Estates

In February 1965, Peter Unger acting for John Wagner, acquired "sight unseen" about 160 acres of barren sagebrush, originally subdivided into 720 lots and known as the Ruby View Trailer Estates, on the outskirts of Elko, Nevada from Mark Norda for $271,225 in trust deeds executed by John Wagner on the property (Tr. 42, 613). Norda had acquired the property just before that time from Bennett Hymes for the considerations of a used Bently valued at less than $2000 and the assumption of the $2700 balance on the original purchase mortgage (Tr. 607). In a shunting pattern aimed at creating more worthless paper, John Wagner conveyed the fee to Golden Rule in exchange for other trust deeds on certain Ruby

[6] John Wagner listed the Rupard Tract, recently acquired for $120,000, at the fantastic value of $6,525,000, but omitted the liability for the unpaid purchase price which was then in default (GX 42-E, 42-H).

View lots, some of which he then assigned to Peter Unger. Golden Rule then conveyed the fee on other lots to Stewart in exchange for approximately $326,000 in additional trust deeds on the property.[7] This Elko property, which was valued at no more than $6400 (Tr. 634) and which was acquired by Peter Unger and John Wagner with absolutely no cash investment, was listed in the financial statements of Golden Rule for March 31 and June 1, 1965 as a $700,000 asset (GX 59-A, 160-A). The financial statement for November 1, 1965 lists 374 of the 700 lots in Elko as "developed realty," again at the incredible value of $1000 each, a total of $374,000, and lists Stewart's trust deeds for $326,000 as "notes receivable" (GX 59-B). The financial statement for June 1, 1966 lists only Stewart's trust deeds, now described as "2nd Trust Deeds on 326 lots Ruby View Estates, Elko, Nevada," and shows $3260 a month income thereon (GX 160-E; Tr. 760).

Creation of More Valueless Paper— Rupard Tract Revisited

In early 1965 Stewart was again used as a "straw" to create additional trust deeds on the Rupard Tract. John Wagner and Peter Unger had acquired the Rupard Tract for $120,000 in worthless and dishonored promissory notes and trust deeds which ultimately resulted in foreclosure of their interest in April 1965. Stewart placed in escrow a deed to Golden Rule for 200 lots in the Rupard Tract, even though he had no title to convey, in exchange for twenty $20,000 trust deeds issued by Golden Rule to him (GX 23-B, 23-C, 23-D, 23-H; Tr. 757). He then assigned this $400,000 in trust deeds back to Golden Rule (GX 23-I to 23-CC; Tr. 756), which then listed them on its financial statements of March 31 and November 1, 1965 as "free and clear" assets of $400,000 (GX 312-B, 160-C; Tr. 757-58).

---

[7] Stewart admitted he was told that he would never have to make any of the required $3260 monthly payments, and that he never intended to because he would have been unable to do so (Tr. 760, 773).

E. Golden Rule Moves to San Francisco—GRR Development, Inc. Is Formed

In March 1965, the center of operations of Golden Rule was transferred to San Francisco, where the corporate name was changed to GRR Development, Inc. (GRR), and bank accounts were opened (Tr. 498, 501, 509). This phase of the defendants' activities encompassed the application for credit at San Francisco banks using false financial statements which omitted all liabilities and showed only millions of dollars in assets from the ownership of Elsinore, Elko and Hawaiian properties and trust deeds (GX 312-B, 337-A-1, 337-B-1; Tr. 502-505, 509-12, 523, 563, 566.[8] Similarly, false financial statements submitted to Dun & Bradstreet flagrantly represented a net worth increasing from $1,000,000 to nearly $10,000,000 (GX 160B, 160C; Tr. 547-48). After establishing "respectable" credit and banking references, the defendants continued to broaden their deceptive real estate operations.

Temelec Project

In May 1965, GRR entered into negotiations for the purchase of a 1000-home retirement project on 180 acres north of San Francisco, known as Temelec, Inc., with Claxton, Weiss & Associates, its financially over-extended contractors (Tr. 555). Claxton and Weiss agreed to assign their stock to GRR, subject to the California Corporation Commissioner's approval, and project assistance, in exchange for John Wagner, Christensen and Jongeward's "hold harmless" agreement and $10,000.00 worth of Vance's Evans Tract trust deeds in consideration for their technical assistance as contractors on the project. In addition, GRR agreed to assume Claxton and Weiss' obligations on the property. The stock transfer transaction was never completed (Tr. 566). Nevertheless GRR immediately added the property to its financial statement for June 1, 1965 as an asset of $3,600,000, and showed liabilities of only $36,000 thereon, and further

[8] For a discussion of the implementation of the fraudulant scheme in Hawaii see Part F, *infra.*

noted that GRR would start the second phase of the project within two weeks and would complete a golf course and 1000 homes within 18 months (GX 59A, 160B). In fact, the land itself, listed at a value of $2,880,000 by GRR, was worth at best only $900,000; the liabilities were about $500,000; and the proposed development was never undertaken (Tr. 565). In addition, despite John Wagner's assurances that payments on the trust deeds were current, Claxton and Weiss received no payments from Vance, the obligor, and received no replies to their letters to him (Tr. 561).

F. GRR Activities in Hawaii

With their vast inventory of worthless paper and a falsely created image of wealth and success, the defendants shifted to Hawaii to acquire and "milk" more income-producing properties. It was during this Hawaiian phase, embracing the acquisition of the Aloha Estates, that Robert Wagner became an active participant in the fraudulent scheme along with John Wagner, Peter Unger, Christensen, Jongeward and Stewart.

Acquisition of Aloha Estates

Robert Wagner was a member of the nine-stockholder coordinating committee which directed the affairs of Aloha Estates, part of a large land development on the "big island" of Hawaii. Its owners, a group of real estate investors in three corporations, were having difficulty making mortgage payments and carrying on the development program. Robert Wagner was also the resident manager of Aloha Estates. He and Robert Thomas, another member of the coordinating committee, held interests in a $33,000 second mortgage on the property which they had received for performing engineering services as Pack & Associates. In April 1965, through a real estate broker named Shipman, GRR offered to purchase 173 lots in Aloha Estates for a $203,780 promissory note secured by a purchase money mortgage. The Hawaiian investors, after receiving GRR's financial statement for March 1, 1965, accepted the offer and deeded the lots to GRR, with monthly payments

on the promissory note scheduled to begin in June 1965 (GX 81-D, 275-B, 201-OO, 201-NN; Tr. 850, 851, 855, 866). When GRR failed to make payments for June and July 1965, the coordinating committee sent Robert Wagner, who had had the major responsibility for negotiating the deal for the Hawaiians, to the mainland to seek a rescission (Tr. 867-68). On August 13, 1965, Robert Wagner reported back to the coordinating committee that GRR would not deed back the properties because the $33,000 second mortgage to Pack & Associates had not been previously disclosed.[9] He then transmitted to the committee GRR's offer to exchange 50¢ in trust deeds on properties in Elsinore, California and Elko, Nevada for $1 in stock in the Hawaiian investors' corporations which held Aloha Estates (Tr. 869). According to the committee members, Robert Wagner told them that he had seen the Elsinore properties; that the land was "a going development" (Tr. 888), "fully developed" (Tr. 921), "beginning to develop" (Tr. 869), and "under development" (Tr. 953); and that lots were improved and the developer was building homes on them (Tr. 912). He also told them that the trust deeds offered in exchange by GRR were good and valid, and that payments were being made on them (Tr. 899, 928). He then distributed an out-dated brochure describing the Elsinore area without mentioning that the brochure, was not current (GX 323-A; Tr. 889-90).

In response to Robert Wagner's August 14, 1965 letter to John Wagner requesting that a GRR representative present the offer to the Hawaiian investors (GX 201-D), Christensen met with the investors on August 27, 1965, told them of GRR's exchange offer and produced a sample trust deed showing current payments (Tr. 871). Christensen explained that the exchange offer involved first trust deeds; that the land was being developed by a contractor;

---

[9] Robert Wagner admitted that he deliberately concealed this mortgage during the negotiations because he "wanted a little pawn," but that his intention to remove it was thwarted when the Internal Revenue Service placed a lien on Thomas' interest (Tr. 2568).

and that the trust deeds would be paid off as the houses were sold (Tr. 891, 912). After Christensen left the room, Robert Wagner stated that he had checked with a financial institution around Riverside where the payments were purportedly made, and represented that they were current (Tr. 871).[10] Following these convincing performances of Robert Wagner and Christensen, nearly all the Hawaiian investors agreed to accept the GRR trust deeds for their stock, and an escrow was opened to accomplish the exchange (GX 111-A to 111-AA; Tr. 998). Thus, with the indispensable assistance of Robert Wagner, GRR acquired Aloha Estates by giving the Hawaiians the worthless trust deeds executed by Peter Unger on the Rupard Tract parcels, and the equally valueless trust deeds executed by Vance on the Evans Tract property (GX 268-B; GX 93-S, Tr. 1016; GX 82-A, 82-B; Tr. 891; GX 88-A, Tr. 873; GX 90-A, 90-B, Tr. 953). Neither Peter Unger nor Vance made any payments on the trust deeds, and neither replied to any letters written to them by the Hawaiians (Tr. 892-94, 922, 930, 954, 1016).

While Robert Wagner was inducing his fellow Hawaiian investors to accept GRR's exchange offer, and thereafter, he concealed from them: that he was assisting John Wagner, Peter Unger and Christensen in May 1965 in seeking acquisition of distress properties (Tr. 2564, 2505; GX 201-A); that he transferred his interest in the second mortgage of Pack & Associates on Aloha Estates to John Wagner in July 1965 in exchange for trust deeds on Los Angeles apartment houses which he attempted to sell for cash with the help of Peter Unger and which he later attempted to have John Wagner sell for an equity in a residence in Portland, apparently in anticipation of his working for GRR there (GX 201-F; Tr. 2496-97, 2499,

---

[10] Thomas was not present at this meeting, but he was contacted by Robert Wagner, John Wagner and Christensen in September 1965. Robert Wagner then told him that the Elsinore properties were good, and that his check at the institution where payments were being made showed that six or seven payments had been made and were current (Tr. 939).

2503-2504); that in about August 1965, he attempted to arrange a bank loan to finance a deal involving his purchase of a second unit of lots in Aloha Estates and its subsequent sale to GRR for approximately $430,000 (GX 201-E, 201-G, 201-H, 591-G; Tr. 2507-2508, 2562-70); that during September 1965 he wrote John Wagner with respect to his employment with GRR in Portland (GX 201-F, 201-G; Tr. 2512, 2555); and that in early October he wrote to John Wagner that "I have spent much time and money getting the Aloha Estates deal to this point and I really need help. I must be able to count on something very soon." (GX 201-G; Tr. 1076, 2511).

Lulling Activities

Subsequent to the acceptance of GRR's exchange offer, Robert Wagner and Peter Unger continued to lull investors concerning this transaction. For example, A. Lee Brown, a Hawaiian investor who had received no reply to his letters to Peter Unger, received, to his amazement, an offer to purchase his house from Peter Unger, representing himself as President of Aloha Development, Inc. (Tr. 904, 906; GX 324-A). Unaware that Brown held his trust deeds, Peter Unger met with Brown in January 1966 and described the great financial worth and extensive holdings of his corporation and explained that it was his method of operation not to deal in cash (Tr. 907). When Brown confronted him about his trust deeds, Peter Unger admitted he had made no payments and said he believed he wasn't obligated to do so until January 1966 (Tr. 908). The next day Peter Unger left Brown a note and a $20 check for the January payment.[11] Brown, receiving no subsequent payments, then called a meeting of some of the Hawaiian investors, including Robert Wagner, to tell of his en-

[11] The note stated: "I think the payments have been made to Mr. Wagner through December 1965. I will check my papers on the mainland. Please send payment book, Pete." (GX 288-A). In a similar manner, Peter Unger lulled Hawaiian investor Mrs. Marie King into believing she would receive future payments by virtue of his contacting John Wagner (Tr. 1211).

counter with Peter Unger and expressed his opinion that Peter Unger was a "con man." Robert Wagner, falsely denying that he knew anything about Peter Unger or that he had even met him, cautioned Brown against calling him a "con man" (Tr. 911, 941).

While on several occasions Robert Wagner advised his friends in Hawaii that Peter Unger and John Wagner were "shysters" and wholly untrustworthy,[12] he nevertheless continued to associate with them and for many months thereafter participated in their activities. After his return from the mainland in December 1965, Robert Wagner and Peter Unger, now in control of Aloha Estates, opened a bank account for Aloha Development, Inc. at the Bank of Hawaii, listing Robert Wagner as president and Peter Unger as vice-president (GX 321-C). Thereafter proceeds

---

[12] Charles Voight, holder of the first mortgage on Aloha Estates, told Robert Wagner that he had just received a letter from Christensen advising him that he had just lined up a group of Phoenix, Arizona investors who were interested in developing the Aloha Estates project (GX 297-E; Tr. 1929). Robert Wagner then said that since he was going to the mainland to check on the trust deeds his group had received from GRR, he would also check on the Phoenix deal for Voight. Upon his return from the mainland in December 1965, Robert Wagner advised Voight that the trust deeds were "phonies", that the people did not own the land and that no money had been paid down (Tr. 1931, 2485). Further, David Oppenheimer, an Hawaiian investor who relied upon Robert Wagner in accepting the GRR exchange offer, received a letter from Robert Wagner dated February 16, 1966, stating:

> I cannot say that I am very surprised to find out that the TD's are phony. . . . As far as taking legal action against the shysters, I really an not interested in participating for a number of reasons. The first being that I don't think that it would be financially worth the while. Secondly, I do not think that California law would work fast enough to help us. By this I mean that by the time you got the thing to court and found Wagner, it would be 1999. Thirdly, if I put the same amount of time, money and effort into something constructive, I would then make up my loss many times over. Fourthly, Wagner would in all probability countersue because of Thomas' liens on the property. From the very start, we sold a clouded piece of property to them, so who really was at fault from the start? If further events take place, please notify me of them. Yours very truly, Bob. (GX 93-PP, Tr. 2572-73)

from lot sales were deposited in this account, and both of them made withdrawals for their personal use and benefit (Tr. 1001, 2495). In February 1966, Peter Unger became disenchanted with the operation of Aloha Estates and Robert Wagner gained complete control; but he was unable to prevent foreclosure on the first mortgage, and Aloha Estates was taken over by a Commissioner in March 1966 (Tr. 1069-75).

In addition, Robert Wagner worked with Peter Unger on numerous real estate transactions in Hawaii, at a time when he knew the deception practiced on the Hawaiians. One such transaction involved Benjamin Michael, who had advertised his $70,000 home and lots for sale in January 1966. Peter Unger and Robert Wagner, represented themselves as wealthy and successful real estate operators acting on behalf of Christensen, president of GRR, a company which had over $7.5 million in assets and offered to purchase Michael's house. (Tr. 1059). After Michael agreed to the offer, Peter Unger, who was to make the payments until Chistrensen had the papers drawn up, moved into the house in February 1966. Peter Unger made the payments for February and March 1966, and then, as he had previously done with the Lishner property, leased the house for $200 a month. When no papers were forthcoming, Michael telephoned Christensen who told him not to worry and that he would back up any deal made by Peter Unger. Michael heard nothing further from Christensen, but Peter Unger wrote him reassuringly on March 1, 1966, offering in payment a second mortgage on a residence he had purchased in December 1965 from Langston [13] in Phoenix with phony Elsinore trust deeds (GX 600, Tr. 2449). Peter Unger again wrote Michael on March 8, 1966, explaining that GRR and Robert Wagner were attempting to buy the Pacific Empress Hotel which he (Unger) would probably run, and that Christensen, who had been in Jamaica, would take care of the papers on his (Michael's) house in a few days (GX 370-A; Tr. 1063). Michael never received the papers or any payments (Tr.

[13] For a discussion of this acquisition see Part G, *infra*.

1061). Robert Wagner then joined John Wagner, Peter Unger, Christensen and Jongeward on the mainland in March 1966 and participated in the group's acquisition of other properties in Oregon and other Western states, in exchange for worthless securities.

G. GRR Activities in Portland, Oregon and Phoenix, Arizona

In July or August 1965, John Wagner and Christensen met John Clarke, a Portland realtor, and his saleswoman, Dixie Vilks, by answering an advertisement offering an apartment for sale. John Wagner and Christensen represented that they owned over $9 million in property and "paper," including trust deeds on properties in California and Nevada (Tr. 1525). They explained that their notes were good for loans up to 50% (Tr. 1527). They gave Clarke a financial statement of June 8, 1965 showing a net worth of nearly $6 million. Included in the GRR assets were the Rupard Tract lots ($400,000) which had been foreclosed in April 1965; the Temelec project ($3,000,000) which they did not own; the near-worthless Elko sage brush tract ($750,000); and the Aloha Estates property ($555,000) which they had just purchased for approximately $200,000 (GX 504-A). They showed Clarke trust deeds on the Elko property issued to John Wagner by Stewart, who they said was a developer, and represented that payments on the trust deeds were current (Tr. 1539). Soon after this initial meeting, and without even looking at the buildings, they made offers through Vilks to purchase the Galaxy Apartments, a million dollar structure, and the Alameda and the Jarrett, all Federal Housing Administration (F.H.A.) insured buildings in Portland (GX 59-C, 137-C, 137-E; Tr. 1535). In the now familiar pattern, many properties were immediately added to the assets shown on the GRR financial statements at greatly increased values after the offers were made even though the sales never closed (GX 59-B, 59-M, 59-KK; Tr. 1549-51). John Wagner also directed Vilks to send out to the Computer Listing Service, a nation-wide real estate brokers' associ-

ation, offers to purchase millions of dollars of properties in California, Colorado, Washington, and Texas which he had selected at random after looking at pictures in her listing book (Tr. 1552-66). As a result, GRR's false financial statements were circulated in Colorado, Washington and Texas, in addition to California, Nevada, Hawaii and Oregon.[14] One of the offers made through Vilks eventually resulted in the purchase by GRR of the Puebloan Motor Inn.[15]

Acquisition of the Hollywood Towne House

Perhaps the largest transaction resulting from such offers was the purchase for approximately $3 million of the Hollywood Towne House, a newly completed F.H.A. financed high-rise apartment in Portland which had been operating at a loss for some time. The owners were so financially distressed that the mortgage payments of approximately $17,000 a month were typically made 59 days late to prevent a 60-day delinquency and default.[16] Negotiations for the purchase of Hollywood Towne House were carried on by John Wagner and Christensen with John Prag and Thomas Spencer,[17] two of the three principal owners of the building (Tr. 1094). John Wagner and Christensen again represented themselves as large real estate developers who owned Hawaiian properties which John Wagner said had been owned by "his father" Robert Wagner (Tr. 1120-22, 1226, 1278). In addition to obtaining reports on GRR from Dun & Bradstreet, Prag and

---

[14] Vilks accompanied John Wagner and Jongeward on a trip to Texas and Colorado. An offer was made to purchase the Redstone Lodge and Country Club in Colorado for $1,500,000 (GX 59-P; Tr. 1559).

[15] See Part I, *infra.*

[16] At one point John Wagner had told the sellers that he was not concerned with the building's operating losses because they would sell it for a big profit to a group of wealthy Arizona investors who were looking for a tax loss situation (Tr. 1132).

[17] Prag and Spencer were count witnesses in Count V of the indictment.

Spencer received a GRR financial statement of June 1, 1965 showing $6 million in assets. John Wagner and Christensen represented that this statement was out-of-date and that a current financial statement would show approximately $8 million in assets (GX 504-A, 504-B; Tr. 1108, 1123, 1279).

In November 1965, even though the sale was not yet completed, GRR listed the Hollywood Towne House as an asset on its financial statement without disclosing any liability for the purchase price or other obligations that were to be assumed (Tr. 1286-87). In the final agreement in early December 1965, the stock of Hollywood Towne House, Inc. was sold to GRR in exchange for its agreement to assume the almost $2.5 million mortgage and to promptly make all mortgage, tax and lien payments on the building (GX 502-A). While GRR paid no cash, it did give its corporate notes for $829,000, secured in part by a second mortgage for $203,780 on the Aloha Estates property and an assignment of the second mortgage Robert Wagner had obtained on that property (GX 506-F, 506-J; Tr. 243, 1183-84). Election of new directors and officers of Hollywood Towne House, Inc. was then held: John Wagner became president, and Christensen became vice-president and secretary treasurer.

The F.H.A. insured mortgage on the property incorporated provisions of a regulatory agreement which prohibited collection of more than the current month's rentals plus a deposit; prohibited disposition of the property or of the rentals therefrom except for operating expenses and repairs; required deposit of rentals in a special project bank account; and required that monthly reports be filed, furnishing certain prescribed information (Tr. 1085-90; GX 501). The requirements of this regulatory agreement, also binding by its terms upon purchasers, were discussed in detail with John Wagner and Christensen prior to GRR's purchase (Tr. 1123).

Following the purchase, the Hollywood Towne House became the headquarters for GRR's operations; GRR offices were set up, and prospective sellers of other properties were

given free overnight apartments (Tr. 1960). Contrary to the regulatory agreement, a program of advance discount rentals was instituted (GX 515-A, 515-B; Tr. 1142, 1634-37, 1358, 1365). From December 1965 to mid-March 1966, the period of GRR's occupancy, approximately $113,600 was received and partly deposited in personal bank accounts of the new owners (GX 59-A to 59-D). Most of these monies were spent by John Wagner, Christensen, and Jongeward for non-operating expenses, or converted to their personal use (Tr. 1653-62, 1673-78).[18] Reports were filed with F.H.A. which falsely reported the monies received from rentals and falsely omitted the disbursements made to John Wagner and Christensen (Tr. 1662-64; GX 535-D).[19] Checks drawn by GRR for the monthly installments on the mortgage were returned "NSF" (insufficient funds), and had to be replaced by checks of Prag and Spencer (Tr. 1302-1304). When Prag and Spencer complained about GRR's lack of ready finances, they were told by John Wagner that the Hollywood Towne House had been sold to a group of Southwestern investors who would make GRR's required mortgage payments (Tr. 1140, 1283; GX 512-A). Continuing default by GRR in meeting mortgage payments led to foreclosure on the Hollywood Towne House on March 16, 1966 (Tr. 1324-27, 1355). Prag and Spencer lost all equity in the building, and their interest in the Aloha Estates property was wiped out by foreclosure of the prior mortgage (Tr. 1244).

---

[18] Funds converted into cashier's checks and then to American Express traveler's checks were transported in interstate commerce and expended at such places as New Orleans, Jamaica, and Hialeah, Florida (Tr. 1665-68). Other funds were disbursed by John Wagner for star sapphire jewelry in Palm Springs and a platinum diamond ring in San Francisco (GX 568-A, 568-B, 556-A to 556-C; Tr. 1290-92). These activities constitute the basis of Counts XVI and XVII of the indictment.

[19] This device constituted part of the basis of Counts XIV and XV of the indictment.

Lou Peg Escrow

Also during December 1965, Christensen had written Charles Voight, whose company held the first mortgage on the Aloha Estates, that he and GRR "had just signed up a group of investors in Phoenix interested in developing this [Aloha Estates] project to provide them with a tax shelter" and that escrow instructions would be forthcoming (GX 297-E; Tr. 1929). This phase of the GRR group's activities involved a "sham" sale in Scottsdale, Arizona in November 1965 between John Wagner and Peter Unger, the "professional investors from the Southwest." An escrow was set up whereby GRR was to deliver to a corporation called Lou Peg all of the stock of Hollywood Towne House in exchange for $750,000, with $250,000 in cash and the balance in titles to 48 Paonessa Tract parcels (GX 71-A; Tr. 1380, 1391). Peter Unger, who was President of Lou Peg, admitted that it was a shell corporation, and that he was to buy the Hollywood Towne Touse "with nothing" (Tr. 2401, 2438). The escrow never closed.

Langston Property

At about this time, Peter Unger and John Wagner answered a newspaper advertisement of Dorothy Shackelford Dill,[20] a Phoenix real estate broker, offering John Langston's residence for sale. Peter Unger, representing that he was setting up an operation in Phoenix for Lou Peg, made an offer to purchase the residence with two Elko trust deeds on which John Wagner was the obligor (Tr. 807). Peter Unger also described John Wagner as a very wealthy man with extensive real estate holdings, and showed Dill a GRR financial statement and pictures of properties purportedly owned. He stated that the Elko property was "selling good" and that John Wagner's payments were current, as evidenced by a schedule showing $30.00 monthly payments on each promissory note (Tr. 809). The Langston transaction was placed in escrow

[20] Dorothy Shackelford Dill was the count witness in Count XIII of the indictment.

with the understanding that Peter Unger would obtain a new mortgage loan on the equity in the house, and that the $6,000 balance would be paid in Elko trust deeds (GX 73-A, 117-C, 117-D). These trust deeds, originally issued by Golden Rule to John Wagner, were assigned by him to Peter Unger, who then assigned them to Langston. After obtaining a Dun & Bradstreet report on GRR and the GRR financial statement, Langston agreed to accept the deal (Tr. 796). Peter Unger immediately set up a second escrow, and resold the Langston residence to Christensen for $24,000. In a "milking" operation, Christensen borrowed $20,000 on the residence from a bank, and after paying the mortgage and $4,000 to Langston, disbursed the balance to Peter Unger, and rented the house for $160 a month. Payments on the mortgage were not made, resulting in foreclosure (Tr. 813). No payments were ever received by Langston on the trust deeds; when he called GRR, Jongeward told him "It's none of your damn business" (Tr. 800). After Langston made three telephone calls to him, Peter Unger finally admitted that the trust deeds were no good, and laughed and hung up when Langston called him a "con man" (Tr. 801). Peter Unger admitted that Christensen was just a "straw man" in the deal and that the plan was to split the profits on the transaction (Tr. 2441). He also admitted that he offered a second trust deed on the Langston home to a Hawaiian investor who was threatening to sue him for failing to complete the purchase of his home in Hawaii (Tr. 1066).

Hollywood Towne House Revisited

Shortly before the foreclosure on the Hollywood Towne House in March 1966, Robert Wagner appeared in Portland and claimed he had purchased the Hollywood Towne House on behalf of a group of Hawaiian investors (Tr. 1412). He had an escrow set up for this purported purchase with a company which he and his attorney had incorporated in Hawaii a few weeks before (GX 547-A; Tr. 1423-24). He furnished an apartment for himself and took over management of the apartments (Tr. 1400). He

then met with Pederson, the F.H.A. representative and with Commonwealth, Inc., a Portland investment bank which later was appointed receiver in the foreclosure proceeding, from which he was seeking financial assistance in his take-over of the Hollywood Towne House (Tr. 1398). At these meetings, he produced minutes of a December 14, 1965 meeting of the Hollywood Town House directors showing his election as president and his wife's election as vice president, and submitted a personal financial statement showing a personal net worth in excess of $1 million (GX 548-B, 546-A). Following the familiar practice of the GRR group, Robert Wagner falsely listed as a personal asset $32,500 "cash in escrow" which actually belonged to purchasers of lots; and falsely listed under his schedule of real estate assets, Kona Sea View Lots, at a value of approximately $500,000, which properties he did not own and which were in any event, subject to mortgages of $395,000 that were not listed under his liabilities (Tr. 1416-18, 2554). In addition, he falsely included as assets, under the schedule of notes receivable, a $7,400 note secured by a trust deed, which Robert Wagner admitted had been "loaned" to him by John Wagner; a $20,000 trust deed executed by Stewart on Ruby View Trailer Estates in Elko; and a $3,750 note and trust deed executed by Peter Unger on Rupard Tract parcels (Tr. 2558-59). Robert Wagner's attempt to so acquire the Hollywood Towne House was unsuccessful. Nevertheless, he continued actively to participate in the activities of the GRR group.

H. Other Activities in Oregon

The GRR group continued to distribute patently false financial statements from its center of operations in the Hollywood Towne House in Portland during 1965 and 1966.[21] It was during this period that Dixie Vilks and

[21] John Wagner and Christensen's dealings with Ralph Perry, an escrow agent in Portland, reveal the GRR group's use of fraudulent financial statements and the trust deeds executed on Elsinore and Elko properties. Perry questioned them regarding their various business activities after he received GRR's financial statement and was told by John Wagner and Christensen that they bought and developed the Elsinore properties, and had built many fine homes

Harry Trip, another Portland realtor who became a GRR "field agent," were active in "finding" real estate deals for John Wagner, Christensen and Jongeward to transact in the name of GRR. While several of these deals were unsuccessful, many new acquisitions were consummated by the GRR group thereby providing them with more "assets" to further inflate their financial statements, and with more opportunities to convert the income and other revenues of the properties to their own personal use.

Barkdoll Property

In August 1965, a 25-acre tract in the Portland area was purchased from Dr. George Barkdoll [22] for approximately $82,000. The consideration given Barkdoll consisted of $37,000 in GRR notes; $35,000 in trust deeds executed by Stewart on Elko properties (GX 56-L, 56-M); a $7,500 trust deed executed by Peter Unger on the Paonessa Tract (GX 56-J); and a $2,700 trust deed executed by Cristall on the Evans Tract (GX 56-J to 56-M; Tr. 654). Barkdoll was shown sample trust deeds indicating current payments. GRR did make two payments for December 1965 and January 1966 on its notes in order to forestall suspicion; but it and the other obligors, Peter Unger, Stewart and Cristall, made no other payments, and never answered Barkdoll's letters notifying them of default in subsequent payments (Tr. 663-69).

Associated Thrift Motels

Coincident with its purchase, GRR used the Barkdoll property as a down payment in its acquisition of two Portland motels from Associated Thrift at a total price of $380,500 (GX 53-A). Monthly payments of $1,055 and

---

there; that Peter Unger had issued a large number of trust deeds because he was building many homes there; that payments not shown on the trust deeds had been received in GRR's San Francisco office but had not been recorded yet; and that the Elko property was fully developed, with concrete slabs poured and utilities installed (Tr. 1751-53).

[22] Dr. Barkdoll was a count witness in Count II of the indictment.

$1,365 on the two purchase money mortgages on the motels were never made; and operating expenses such as power, water and laundry were never paid (GX 2-L, 2-W; Tr. 1727, 1733). In addition, rentals of $16,000 to $17,000 were siphoned off during the two and one-half month period before GRR was ousted by foreclosure.

Drake Property

In September 1965, Claude Drake [23] received an offer to purchase his 96-acre rock quarry in the Portland area from GRR through Trip, with whom Drake had listed the property for sale. After obtaining a GRR financial report, Drake agreed to sell his property for $30,000, with payment by GRR's corporate note and purchase money mortgage (GX 57-D, Tr. 1459.) GRR made no payments on its notes, but did list the property on its November 1, 1965 balance sheet at the incredible valuation of $150,000, without showing any liability for the $30,000 purchase price (GX 160-C; Tr. 1461-63).

Sharer Property

Elmer Sharer,[24] the owner of 1036 acres of farm land near McMinnville, Oregon, received an offer for his property from John Wagner and Christensen, who agreed to purchase it on behalf of GRR for $200,000 and payment of back taxes (Tr. 1569). Documents were mailed to Sharer's attorney and an escrow was set up (GX 277-A, 3-A to 3-H; Tr. 1571). However, the escrow did not close due to GRR's non-performance of the agreement (Tr. 1573). Nevertheless, as with the Drake and other properties, GRR listed the Sharer property on its November 1, 1965 balance sheet at the fantastic valuation of $2 million and therein described it as including "proposed 2211 residential lots now under construction" (GX 59-B, 160-C;

[23] Claude Drake was a count witness in Count VIII of the indictment.

[24] Elmer Sharer was a count witness in Count VI of the indictment.

Tr. 1576). In addition, this balance sheet listed a non-existent 52-unit motel in McMinnville at a value of $600,000 (Tr. 1582-83).

Gay Apartments

Again using Vilks and Trip, GRR made offers to Ralph Gay to purchase four apartments: the Alameda Court for $155,000; the Jarrett Street Apartments for $79,000; the Golf View Apartments for $800,000; and the Westmore Arms for $300,000 (Tr. 687-89). Eventually, GRR acquired the Jarrett Steet, Alameda and Golf View properties, taking possession about January 1, 1966. In addition to assuming the existing mortgages on the properties, GRR gave Gay its purchase money notes, a second mortgage on the Drake quarry, and four $20,000 trust deeds issued by Stewart on the Ruby View Trailer Estates in Elko, payments on which were misrepresented as current (GX 144-E, 144-F, 144-G, 362-A; Tr. 692-96, 700-707). Payments on the assumed mortgages were never made; water and utility bills were left unpaid; and no payments were made on the trust deeds. From January through March 1966 GRR milked the properties, taking approximately $640 a month from Jarrett Street, $1200 a month from Alameda and $8,700 from Golf View (Tr. 709). Gay lost the Jarrett Street Apartments through foreclosure, but avoided the loss of the Alameda and Golf View properties by making up approximately $6,000 in defaulted payments. When Gay was in the process of recovering the Golf View, Robert Wagner appeared and offered to take over GRR's position, but no deal was consummated (Tr. 719-22).

Kappel Valley Ranch

In August 1965, Walter Koohtin received GRR's $840,000 purchase offer from a Portland realtor for the Kappel Valley Ranch in Napa County, California (GX 158-C). A $200,000 cash down payment was to be arranged through Kosieris (Tr. 1612). Although Koohtin received reassuring letters from GRR and Kosieris, and Kosieris was paid a $2,500 fee for funding the loan, no loan materialized and

the sale did not take place (GX 158-N, 158-Q, 158-V, 158-X; Tr. 1615-21). However, GRR listed this property on its financial statement of November 1, 1965 as an asset at the inflated valuation of $3.2 million (GX 160-C).[25]

Dick Property

In February 1966, rancher Rex Dick and his wife, of John Day, Oregon, were invited to the "plush" office suite of GRR in the Hollywood Towne House,[26] where they were falsely told by John Wagner and Christensen that their large California corporation was buying up ranch lands to be used to pasture the cattle of the Ralston Purina Company (Tr. 1957, 1962, 1972, 1980-81). Without hesitation, John Wagner and Christensen met Dick's asking price for his ranch of $185,000 (Tr. 1963).[27] Dick also sold them approximately 180 head of cattle, at $200 a head. This herd was mortgaged to the Bank of Eastern Oregon for approximately $33,000. John Wagner falsely represented to Dick that he had been told by the Ralston Purina people that the land had to be free of all cattle for 30 days and then stand inspection before Ralston Purina cattle would be brought in (Tr. 1982). John Wagner and Christensen, again misrepresenting that Ralston Purina required the cattle to be sold to clear the land, sought to have the bank permit them to assume Dick's outstanding mortgage loan and grant them a 90-day payment deferment (Tr. 1984). But the bank refused the deal, even

---

[25] The property also appeared on a revised financial statement furnished to Dun & Bradstreet in February 1966 at the valuation of $1 million with a liability of only $400,000 shown (GX 160-D).

[26] During their Portland stay, the Dicks were provided with a luxury apartment in the Hollywood Towne House, offered a Cadillac for their driving convenience, and were wined and dined at a fashionable Portland restaurant (Tr. 1960-63).

[27] GRR refinanced a mortgage to Dick's brother by giving him a GRR note and mortgage for $86,000 (GX 155-A, 155-B, 155-C, 155-E; Tr. 1968). Dick himself was hired as "coordinator of ranches" at a never-paid salary of $600 a month, and was directed to plow up part of the acreage to plant alfalfa (Tr. 1970).

after it received the GRR financial statement it had requested (GX 157-A, 584-I; Tr. 1986). Despite the bank's refusal, GRR sold the Dick cattle to Carl Christianson, who also was told the Ralston Purina fabrication, and received Christianson's $17,500 check in part payment (GX 584-A, 584-G to 584-I; Tr. 1994). When the bank learned of this sale, it refused to permit the cattle to be moved (Tr. 1988). Christianson attempted to stop payment on his check, but it had been certified and then converted to cashier's checks by John Wagner and Christensen (GX 584-A). These cashier's checks were then taken to Los Angeles and turned over to GRR's attorney, Robert Bunnett. Shortly thereafter Bunnett converted the old checks into new cashier's checks which were then paid in part to John Wagner, and in part to Bunnett himself for past legal fees (Tr. 2009, 2115-18). Through all these machinations, Christianson despite reassures by both Christensen and John Wagner that the matter would be straightened out, lost his $17,500.

Foster Properties

As a result of a meeting arranged by a realtor with John Wagner at the Hollywood Towne House, rancher William Foster, also of John Day, Oregon, was offered a total of $757,000, with a $17,000 cash down payment, for his two ranches totaling approximately 30,000 acres in central Oregon (Tr. 2048-49). An escrow was set up, and Foster mailed the deeds in for recording (GX 193-C, 65-B, 65-C; Tr. 2057). The sale was not effected because the $17,000 down payment was never made (Tr. 2052). However, following the recurrent pattern, GRR listed the Foster ranches as assets on its financial statement of February 28, 1966, at a valuation of $1,425,000, with the notation, "Now leased for interest payment plus percentage of profits" (GX 160-D).[28]

---

[28] William Foster was a count witness in Counts III and X of the indictment.

Smith Property

With their flagrantly false financial statements, the GRR group, in early 1966, made repeated attempts to acquire the Fontaine, an 88-unit luxury high-rise apartment building in Portland, offering its owner Richard Smith GRR notes in payment (Tr. 1706-1707; GX 62-I). The personal balance sheets Smith was given represented that John Wagner had assets of $2,306,000 and that Christensen had assets of $2,189,000 (GX 139-A; Tr. 1709); the GRR balance sheet for December 31, 1965 showed corporate net worth of $9,495,170, including a false entry of $200,000 cash in the Great Western Bank of Portland.[29] When Smith discovered the obvious falsity of this $200,000 entry, he refused to consider the offers.[30]

Haney Properties

In November 1965, Ralph Haney, after reviewing a GRR financial statement, sold two income-producing duplexes to GRR in exchange for a $7500 promissory note secured by a trust deed executed by Peter Unger to John Wagner on a Paonessa Tract parcel in January 1965, and other consideration. Christensen had represented to Haney that Peter Unger was a well-to-do real estate investor (Tr. 1512). When Haney discovered that Peter

---

[29] John Wagner and Christensen had applied at the Great Western Bank for a $200,000 passbook loan, an arrangement whereby the bank lends money which then is deposited in a savings account from which it cannot be withdrawn until the loan is repaid. The Bank did not grant the loan because it suspected that the arrangement was planned merely as a "window dressing" scheme. The bank officials later discovered that GRR listed this $200,000 "cash in Great Western Bank" on a draft of a financial statement prepared for GRR by a Portland certified public accountant, and also received several inquiries about the non-existent deposit from banks in Hawaii, Washington and California (GX 60-B, 146-A; Tr. 1430-35).

[30] The GRR balance sheet for December 31, 1965 was also used in unsuccessful attempts to acquire a 24-story high-rise apartment building in Portland from Will Fromme (GX 169-D; Tr. 1717), and another large apartment building in Boise, Idaho through a realtor in Ontario, Oregon (Tr. 1476).

Unger's note and trust deed had already been assigned to others,[31] Christensen simply provided him with another $7500 note secured by a trust deed (GX 248-E). When Haney again complained that this paper also had already been assigned to others, Jongeward produced from his briefcase of worthless securities yet another $7500 note secured by a trust deed (GX 248-F; Tr. 1513). When the latest trust deed proved defective in description, Haney prepared a new trust deed to be signed jointly by Peter Unger and John Wagner and gave it to Christensen for forwarding (Tr. 1516). In response to a telephone call from Peter Unger in Las Vegas, Haney wrote to Peter Unger about the necessary corrections they had discussed, and received in reply a letter with a notation on the bottom: "I will be happy cooperate send papers any time Pete, P. O. Box 290, Las Vegas, Nevada" (GX 248-L). Haney wrote to Peter Unger again, explaining the difficulty; he enclosed another trust deed for his signature and suggested that he call collect if he had further questions (GX 248-M). Haney never received any answer.

I. GRR Activities in Salt Lake City, Utah and Pueblo, Colorado

During the period from January to March 1966, the GRR group expanded their activities to Utah and Colorado. It was during this period that Robert Wagner appeared in Portland and actively participated as a "finder" for the GRR group.

Mooney Transaction

In February 1966, Robert Wagner telephoned Jerome Mooney, a Salt Lake City real estate broker whom he had met in Hawaii, and told him that his group, known as GRR Development Co., would be interested in purchasing the Las Vegas apartment complex Mooney had listed for

---

[31] The trust deed and note appear to have been part of the consideration tendered to Smith in the unsuccessful attempt to acquire his resort motel in Oceano, California in January 1965. See Part C, *supra*.

sale (Tr. 1445). Shortly thereafter, at a meeting with Mooney and the building owners in Las Vegas, John Wagner and Robert Wagner, representing GRR as worth $10 million to $15 million, made a proposal to purchase the apartment for $250,000 in GRR notes with no cash down payment (Tr. 1442). During one of the several meetings concerning this transaction between John Wagner, Robert Wagner and Mooney in Salt Lake City during March 1966, John Wagner falsely announced that GRR had just acquired the Mark Hopkins Hotel in San Francisco from Gene Autry (Tr. 1443). In addition to the proposal to purchase the Las Vegas apartment complex, Mooney received eight other offers from GRR, totaling about $1 million, to purchase other properties he listed; not one of these other offers involved cash down payments. None of the deals GRR proposed to Mooney were ever consummated.

Jacobs Transaction

Also in February 1966, Donald Jacobs, a Salt Lake City contractor who had advertised his 68-unit apartment building, known as the Irving Heights, for sale in the Wall Street Journal, received a long distance telephone call from Jongeward who offered to buy the building sight unseen. Shortly thereafter, in a writing confirming the telephone call, GRR offered to purchase the building for $1,200,000, the appraised value, by giving GRR notes in payment with no cash down, even though no one from GRR had yet seen the property (Tr. 1497). Jacobs requested and received a financial statement of GRR, which was accompanied by a February 28, 1966 letter to Dun & Bradstreet which purported to bring that institution "up to the 31st of December" (GX 150-A, 150-B). To his amazement, Jacobs discovered that GRR had listed his Irving Heights apartment as "in escrow" at the inflated price of $1,400,000—$200,000 more than the asking price (Tr. 1499). Jacobs also discovered that GRR had listed the Elko property on the same financial statement at a value of $1000 a lot, a total of $374,000, when his inspection had revealed that

the property was located one-half mile from the main highway, approachable only by a dirt road, and was encumbered by mortgage and trust deeds (Tr. 1502). As a result, GRR's offer to purchase Jacob's Irving Heights apartment was never completed.

Puebloan Motor Inn

The GRR group's activities also reached to Pueblo, Colorado when in February 1966, through an initial contact by a local real estate broker, GRR offered to purchase Lloyd Dishion's Puebloan Motor Inn. The Small Business Administration (S.B.A.) held a $326,000 mortgage on the property; and Dishion's mortgage payments were current. Dishion was furnished with a financial statement of GRR which showed assets in excess of $14 million (Tr. 1833). Jongeward, accompanied by Kosieris, who was introduced as a "mortgage banker from California," offered to purchase the property by giving only GRR notes in payment, but Dishion was unwilling to accept the "no cash" terms (Tr. 1836). Dishion finally agreed to consummate the transaction when Jongeward and Kosieris assured him that they would arrange either a cash down payment or a loan on the GRR notes. GRR took over the Inn on February 28, 1966 (Tr. 1837-50). In another "milking" operation, the gross daily collections of $400 to $600 were sent to GRR in San Francisco by Western Union or Air Express; no payments were made on the mortgage held by the S.B.A., or to creditors whose accounts had been assumed by GRR, or to employees; and the telephone service was disconnected for non-payment of bills and the bar closed for non-payment of state taxes (Tr. 1883, 1894, 1901, 1914, 1919). Finally, at the time when foreclosure by the S.B.A. was imminent, Kosieris advised Dishion that he had just heard that the Hollywood Towne House had been foreclosed and that "his people," therefore, would not proceed with the loan arrangement on the GRR notes which Dishion had received in payment for the Inn (Tr. 1908-11, 1853). It was at this time, too, that Robert Wagner appeared in Pueblo to reassure Dishion that the mat-

ter would be straightened out with the S.B.A., and to assure the S.B.A. that something was "in the mill" to take care of the situation (Tr. 1856-59, 1898, 1916). Nevertheless, the S.B.A. did foreclose, and Dishion received nothing on the worthless GRR notes. Robert Wagner moved on with the other defendants to Las Vegas, where the next phase of GRR's operations shifted.

J. GRR Moves to Las Vegas—Enter Pioneer Mortgage Bankers

Peter Unger, after his departure from Hawaii and Aloha Estates, set up business in Las Vegas as a realtor, often acting as GRR's representative. Pioneer Mortgage Bankers Corporation (Pioneer) soon became another GRR acquisition, and thereafter the primary vehicle for carrying on the group's activities at an even more accelerated pace.

Champion Oaks Apartments

At about the time he moved to Las Vegas, Peter Unger was involved in another GRR acquisition handled by Jongeward in Roseville, California. Jongeward, representing GRR, and Ruth Chesney, a real estate broker, entered into an agreement for the sale to GRR of six four-unit dwellings known as the Champion Oaks Apartments for $189,000, with GRR's consideration consisting of its assumption of the $155,000 mortgage and its issuing promissory notes for the balance of the purchase price (GX 222-G; Tr. 2024). Jongeward had furnished Chesney with GRR financial statements showing gross corporate assets of $14 million, and a "revised" financial statement submitted to Dun & Bradstreet showing assets of $10 million (GX 222-B, 222-C, 222-J; Tr. 2022). Within three days after the sale, and before the deed to GRR was even recorded, the property was shunted by conveyance to Peter Unger. Chesney was notified of the change by Pioneer (GX 222-M, 222-Z; Tr. 2025-26). Peter Unger did not make any payments on the mortgage and never answered Chesney's letters; and GRR never made any payments on its promissory notes (Tr. 2033, 2037-38; GX 222-N).

Acquisition of Pioneer Mortgage Bankers

While in Las Vegas, Peter Unger who was using GRR as a credit reference, introduced John Wagner to Lee Potter a Las Vegas mortgage banker whose Pioneer Mortgage Bankers and Princess Homes, Inc. corporations held substantial real estate and mortgage receivables. Representing GRR as a large real estate holding company which acquired large parcels of real estate, John Wagner told Potter that GRR was interested in anything he had to offer. Potter requested and received a November 1, 1965 financial statement of GRR and a March 23, 1966 Dun & Bradstreet report on GRR (GX 172-A, 172-B). The financial report of GRR, showing gross assets in excess of $14 million, falsely listed the Hollywood Towne House at an appraised value of $3,400,000, with yearly gross rentals of $360,000, despite the filing of foreclosure proceedings on March 17, 1966. This financial report also included as other major assets the following worthless, foreclosed or never-acquired properties: 326 Lots, Ruby View Estates, Elko, Nevada, 2d Deed of Trust—$326,000; 20 1st Trust Deeds on Elsinore Land Agency Tract (Stewart)—$400,000; assignment of Lease from Lou Peg Corp.—$600,000; 1036 Acres at McMinnville, Oregon (Sharer)—$2,000,000; 374 Lots, Ruby View Estates—$374,000; and 163 Lots known as Aloha Estates (Unit 1)—$750,000.

In May 1966, Potter agreed to sell his stock in the Pioneer Mortgage Bankers and Princess Homes, Inc. corporations to GRR at a price of $737,000 in consideration for GRR's promissory notes secured by trust deeds, and GRR's assumption of existing mortgages (GX 172-C to 172-H, 172-U). When GRR defaulted on its assumed mortgage payments and on the payment of its other obligations to Potter, the properties held by Potter's two corporations were foreclosed and he lost his equities therein (Tr. 1793, 1797).

Following the acquisition of Pioneer, John Wagner, Christensen, Jongeward and Robert Wagner, who was also

authorized to make offers on its behalf, were elected directors of the corporation, and thereafter the group continued its activities from its new base of operations in Las Vegas, under a new corporate name free from the stigma of the Hollywood Towne House foreclosure. A new financial statement of Pioneer containing false "paper" assets was put together showing $7,200,650 in "Real Estate Owned," including as major assets the Foster Ranch in Oregon at a value of $1,470,000; 174 Ruby View Trailer Estates lots at a value of $348,000; 150 Elsinore lots at a value of $450,000; and the real estate and mortgage receivables just acquired from Potter at values of approximately $2 million and $700,000, respectively (GX 172-SS; Tr. 1795). This Pioneer financial statement also listed an item of $250,226 "Cash at State and Federal Banks," which was the successful result of a tactic using the Crocker Citizens Bank in South Gate, Calif. that had been unsuccessfully attempted earlier at the Great Western Bank in Portland.[32] In this situation, John Wagner applied for a $200,000 bank loan which the Crocker Citizens Bank granted upon condition that the monies be converted immediately into a certificate of deposit to be held by the bank as collateral for the loan (Tr. 1941). There was never any disclosure of this offsetting liability or of the frozen status of the deposit that provided the basis for the "Cash at State and Federal Banks" asset listed on the frequently used financial statement of Pioneer (Tr. 1942).

France Transaction

In July or August 1966, representing himself as an agent interested in buying property for Pioneer in Las Vegas, Robert Wagner contacted real estate broker Terry France in Tarzana, California. He told France that he could make down payments with promissory notes and trust deeds rather than using cash, and offered to purchase a residence for himself and a tract of undeveloped land for

[32] See Part H, *supra*.

Pioneer in Hidden Hills, California for $69,500 and $712,-500, respectively, with payment for the latter to be by Pioneer's promissory notes (Tr. 1946-48; GX 97-A, 97-B). Robert Wagner than submitted a financial statement of Pioneer and orally represented that Pioneer was a substantial and reputable business concern with assets that included trust deeds, hotels, motels and other properties in Hawaii and along the Pacific Coast (GX 97-F; Tr. 1949). When France requested validation of the financial statements, Robert Wagner gave him a covering sheet containing a certification signed by Robert Johnson, purportedly a certified public accountant, which verified the valuation of the assets listed in the statement (GX 97-E; Tr. 1950). In fact, Johnson was not an accountant and the "certificate" had been dictated by Jongeward (Tr. 1768).

Olden Property

Earl Olden, owner of a 40-unit motel, including a dwelling house, restaurant and swimming pool, answered Pioneer's newspaper advertisement and after examining a Pioneer financial statement, entered into an agreement to sell his property for Pioneer's $50,000 promissory note, with no cash involved, and the assumption of all obligations on the property (GX 164-A, 164-C, 164-D; Tr. 1755-57). Pioneer, immediately taking possession and collecting the daily rentals, failed to make any payments on the mortgage or other obligations, resulting in foreclosure and Oldens' loss of his motel property (Tr. 1758-59).

The Albuquerque Hilton

In August 1966, advertisements were placed by Pioneer in the Wall Street Journal for the purchase and sale of investment properties, mortgages and other real estate (GX 63-A, 63-B; Tr. 1923).[33] Thereafter, negotiations for the Albuquerque Hilton in Albuquerque, New Mexico,

[33] The dissemination of these advertisement to subscribers of the Pacific Coast Edition of the Wall Street Journal forms the basis of Count IX in the indictment.

began when defendant Shubin, representing Pioneer, telephoned Charles Cole, manager of the Albuquerque Hilton, and inquired about arranging the sale of the hotel. John Wagner accompanied by his attorney Robert Bunnett, then flew to Albuquerque and gave Cole a May 1966 Pioneer financial statement showing assets of approximately $8,500,000 (GX 374-A). In keeping with his purported practice "to make deals fast," John Wagner signed an agreement that very same day for the sale of the hotel to Pioneer in return for Pioneer's assumption of all existing obligations and its allowing Cole to collect about $55,000 in receivables (Tr. 2063-65; GX 202-O). The following week, Robert Wagner arrived in Albuquerque as the hotel's new manager, installed himself in a hotel suite, and paid himself $50.00 a day plus meals (Tr. 2066). He announced that he was Pioneer's "trouble shooter," and explained that he and John Wagner "wore the airplanes out going back and forth on deals" (Tr. 2066, 2068). He told Cole "he was going to buy a lot of things" in Albuquerque, and after Cole introduced him to Leonard Ginn, a local realtor, Robert Wagner made several offers to Ginn on behalf of Pioneer (Tr. 2608, 2616). While "managing" the hotel, Robert Wagner received mail containing remittances and daily cash receipts estimated to total $2000 to $2500 daily, which for the most part were then funneled through him to Pioneer in Las Vegas (GX 166-A, 166-B). The hotel's operating expenses and other obligations were not paid and Robert Wagner directed that creditors be put off (Tr. 2084-90).

The El Paso Hotel

In an attempt to acquire the El Paso Hotel from the Hilton chain for $1,200,000, John Wagner and Jongeward flew to El Paso, Texas, and met with Hilton executive Spearl Ellison (Tr. 1807). Ellison was not impressed with the May 1966 financial statement of Pioneer, showing assets of approximately $8,500,000 (GX 96-A), and demanded that they meet the obligations Pioneer had assumed on the Albuquerque Hilton. After John Wagner

and Jongeward made some excuse, Ellison evicted them from the Albuquerque hotel (Tr. 1810).

K. The SEC Injunction

On September 9, 1966, the Securities and Exchange Commission filed a civil injunctive action in the United States District Court for the District of Oregon against the corporate defendants and several of the other defendants in the criminal trial, including John Wagner, seeking to enjoin the continuance of the fraudulent course of conduct described above.

ARGUMENT

POINT ONE

The Jury Verdicts Convicting Robert Wagner and Peter Unger are Supported by Substantial Evidence

Robert Wagner and Peter Unger specifically raise the issue of whether there was sufficient evidence in the record to support their convictions on Count I of the indictment. (R.W. Br. Pt. IV C; P.U. Br. Pt. VI.)[1] Both Peter Unger and Robert Wagner concede that John Wagner and other defendants were engaged in a scheme to defraud. But Peter Unger claims that he was not a participant in any illegal transactions and that he had no control over the illegal activities of John Wagner and the other defendants; and Robert Wagner contends that he was an innocent victim of the fraudulent scheme.

This Court has held that the proper test at the appellate level for determining whether there is sufficient evidence in the record to support the jury's guilty verdicts is to determine whether, taking the view most favorable to the government and without weighing conflicting evidence or testing the credibility of witnesses, there is substantial evidence to support the verdicts. *Remner* v. *United States*,

[1] Robert Wagner's Brief on Appeal will be referred to as, "R.W. Br."; Peter Unger's Brief as "P.U. Br." and John Wagner's Brief as "J.W. Br."

205 F.2d 277 (C.A. 9, 1953). *See also Isaacs* v. *United States*, 301 F.2d 706, 713 (C.A. 8, 1962), *cert. denied*, 371 U.S. 818; *Cartwright* v. *United States*, 335 F.2d 919, 921 (C.A. 10, 1964); *Davenport* v. *United States*, 260 F.2d 591, 598 (C.A. 9, 1958), *cert. denied*, 359 U.S. 909 (1959). Furthermore, circumstantial evidence, coupled with the reasonable inferences based thereon, is sufficient to sustain the convictions. *Holland* v. *United States*, 348 U.S. 121 (1954); *United States* v. *Brown*, 236 F.2d 403, 405 (C.A. 2, 1956). Also, in appraising the sufficiency of the evidence to justify an inference of fraudulent intent or bad purpose, the evidence must be viewed in its most favorable light to the government. *Elbel* v. *United States*, 364 F.2d 127 (C.A. 10, 1966), *cert. denied*, 385 U.S. 1014. Criminal intent may be inferred from the conduct of the defendants, and circumstantial evidence, upon which reasonable inferences may be based, is sufficient. *Swallow* v. *United States*, 307 F.2d 81 (C.A. 10, 1963), *cert. denied*, 371 U.S. 950.

Therefore, it was not incumbent on the prosecution to prove that John Wagner, Peter Unger and Robert Wagner entered into a formal agreement that constituted an unlawful conspiracy. Conspiracies by their very nature are secret and clandestine, and are seldom susceptible to proof by direct evidence. Proof of participation in a conspiracy is sufficient if a common purpose and plan "may be inferred from a development and a collocation of circumstances." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Pereira* v. *United States*, 347 U.S. 1, 12 (1954); *Isaacs* v. *United States*, 301 F.2d 706, 725 (C.A. 8, 1962), *cert. denied*, 371 U.S. 818. Whether Peter Unger and Robert Wagner intentionally associated themselves with the conspiracy or scheme masterminded by John Wagner to defraud the victims in this case was a question of fact properly referred to the jury for its decision. *Wall* v. *United States*, 384 F.2d 758 (C.A. 10, 1967); *Beck* v. *United States*, 305 F.2d 595 (C.A. 10, 1962), *cert. denied sub nom., Tuthill* v. *United States*, 371 U.S. 895.

Peter Unger attempts to exculpate himself from the conspiracy charged in Count I by arguing that he did not personally deal with the defrauded victims, and that although he issued and delivered notes and trust deeds to John Wagner and other of the defendants, he was not present when such "paper" was exchanged with the defrauded victims for their property interests. The facts in the record belie Unger's protestations of nonparticipation and lack of contact with the victims. However, even assuming arguendo that Peter Unger did not have contact with the victims, he still would be criminally liable for participating in the conspiracy since he was aware of the scheme, and performed functions and acts necessary for the accomplishment of its illegal purposes; and therefore would be responsible for all of the acts performed by his co-conspirators in furtherance of the conspiracy during the period when he was a member of the illegal scheme. *Della Paoli* v. *United States*, 352 U.S. 232 (1957); *Blumenthal* v. *United States*, 332 U.S. 539 (1947); *Enriquez* v. *United States*, 338 F.2d 165 (C.A. 9, 1964); *Feyrer* v. *United States*, 314 F.2d 110 (C.A. 9, 1963).

Peter Unger and John Wagner were central or core conspirators who formulated the scheme, and thereafter directed the implementation of virtually every aspect of the scheme to build a real estate empire with worthless paper. Peter Unger was a participant in the scheme at its inception in early 1963, when he and John Wagner began to generate worthless paper in the village of Elsinore, California,[2] and continued to play an active role as the scheme blazed its path through California,[3] Oregon,[4] Hawaii,[5] Ari-

---

[2] Paonessa, Rupard and Evans tracts, Part A, counter statement of case.

[3] Lishner and Harris properties, Parts B and C, counter statement of case.

[4] Hollywood Towne House, Part G, counter statement of case.

[5] Aloha Estates and Michael properties, Part F, counter statement of case.

zona,[6] and Nevada.[7] Peter Unger, in concert with John Wagner, performed a crucial function in the scheme by directly creating an inventory of worthless notes and trust deeds which was inflated in value by the delusive shunting of the Paonessa, Rupard, Evans [8] and Elko [9] tracts and the Harris [10] properties to each other, their wives, and nominees. Peter Unger also held himself out to the persons to be defrauded as an agent of the GRR group,[11] and induced victims to rely upon GRR's fraudulent financial statements which reflected as assets the worthless paper he and John Wagner created.[12] He also advised victims that GRR had multi-million dollar assets.[13] In spite of his knowledge that John Wagner and other defendants were using worthless trust deeds and notes which he and John Wagner had issued, to make real estate acquisitions from the victims,[14] Peter Unger misrepresented to such persons that payments on the notes had been made and lulled such victims into believing that additional payments on those notes would be forthcoming in the future.[15] Contrary to Peter Unger's

---

[6] Lou Peg escrow, Langston properties, Part G, counter statement of case.

[7] Ruby View and Elko properties, and Pioneer transactions, Parts D and J, counter statement of case.

[8] Part A of counter statement of case.

[9] Part D of counter statement of case.

[10] Part C of counter statement of case.

[11] *See, e.g.*, testimony of victim Langston (Tr. 793-805), and of victim Michael (Tr. 1056-68).

[12] *See, e.g.*, testimony of Dorthy Shackelford Dill (Tr. 809), and victim Langston (Tr. 796).

[13] *See, e.g.*, testimony of victim Michael (Tr. 1059).

[14] *E.g.*, Peter Unger subsequently admitted to victim Langston that the trust deeds were no good (Tr. 801), and also admitted that through the shell corporation Lou Peg, he was buying the Hollywood Towne House "with nothing" (Tr. 2401, 2438).

[15] *See, e.g.*, testimony of Dorothy Shackleford Dill (Tr. 806-17); of victim King (Tr. 1211); of victim Brown (Tr. 907-10, GX 288-A); of victim Michael (Tr. 1060-63).

assertion that he did not personally profit from the conspiracy alleged in Count I, and consequently had no stake in the illegal venture, the record is replete with evidence that he personally benefited from his participation in the scheme. Thus, he lived rent-free in the Beverly Hills house,[16] collected rents which were converted to his own personal use,[17] discounted trust deeds and other "papers" for cash,[18] and utilized cash income from properties for his own benefit.[19]

A similar review of the evidence adduced at the trial relating to the activities of Robert Wagner clearly establishes his participation in the scheme. Although he did not become associated with the other defendants charged in Count I until approximately May 1965, about two years after the inception of the scheme, he performed essential functions in the implementation of the scheme from at least December 1965 until the group's activities were halted by the SEC injunctive action in September 1966. Whether or not Robert Wagner may have been duped by John Wagner and Peter Unger at the outset, there can be no doubt that by December 1965 he wilfully and knowingly joined in with the others by utilizing worthless paper and falsely inflated financial statements to bilk the public.

Prior to his trip to the mainland in December 1965, Robert Wagner assisted GRR and John Wagner in accomplishing the exchange offer with the Hawaiian investors in Aloha Estates by misrepresenting to such investors that the Elsinore properties had substantial value and that payments on GRR's trust deeds and notes on these properties were current.[20] He created a facade that he was disinterested in the affairs of GRR and the other defendants, and,

---

[16] Lishner property (Tr. 261).

[17] Lishner property (Tr. 261), Michael property (Tr. 1056-68).

[18] Harris properties (Tr. 2417), Langston properties (Tr. 813, 2441).

[19] Aloha Estates (Tr. 1001, 2495).

[20] *See* Part F of counter statement of case.

upon his return from the mainland, appeased the Hawaiian investors by acknowledging that the trust deeds were phonies and that the other defendants were "shysters." [21] Despite these statements to the Hawaiian investors, he proceeded thereafter to misappropriate, with Peter Unger, the proceeds from Aloha Estates; to consummate numerous real estate transactions in Hawaii with Peter Unger; [22] and to travel back to the mainland to participate in the scheme from February through September, 1966. Thus, in February and March 1966 he and John Wagner travelled together representing themselves as agents for GRR, purportedly a corporation with assets in excess of $10 million.[23] When foreclosure proceedings were imminent with respect to two of GRR's projects, the F.H.A. financed Hollywood Towne House of Portland and the S.B.A. financed Puebloan Motor Inn of Pueblo, Colorado, Robert Wagner attempted to forestall the foreclosure actions so that he and the other defendants could continue to "milk" the income from such properties for their own personal use.[24] In May 1966, Robert Wagner became a director of Pioneer, along with John Wagner and other defendants, and continued to seek real estate acquisitions for the group. After a falsely inflated financial statement showing assets of over $7 million was prepared for Pioneer, in July or August 1966, Robert Wagner utilized such financial statements in attempts to acquire further properties for himself and Pioneer.[25] After the group had

---

[21] *See, e.g.*, testimony of victim Voight (Tr. 1931); see also, the February 16, 1966 letter from Robert Wagner to victim Oppenheim (Tr. 2573, GX 93-PP).

[22] For example, in January 1966 Robert Wagner and Peter Unger defrauded Michael in connection with the sale of his house in Hawaii. *See* Part F of counter statement of case. See also (Tr. 1059).

[23] Testimony of Jerome Mooney (Tr. 1440-47).

[24] Hollywood Towne House (Tr. 1398-1412); Puebloan Motor Inn (Tr. 1856-59, 1898, 1916).

[25] *See* France Transaction, Part J of counter statement of case, and testimony of France (Tr. 1945-52).

taken over the Albuquerque Hilton Hotel, he arrived on the scene as Pioneer's "trouble-shooter," became the group's manager of the hotel, and proceeded to siphon off the hotel's receipts to Pioneer and other defendants while stalling the hotel's creditors (Tr. 2066-68, 2084-90).

Furthermore, the facts that Robert Wagner may have been a late joiner in the conspiracy, or that he may not have been aware of the specific details or of all the machinations of John Wagner, Peter Unger, and the other defendants, do not exculpate him from criminal responsibility for the conspiracy charged in Count I,[26] since there was sufficient direct and circumstantial evidence in the record for the jury to find that Robert Wagner was aware of the essential nature of the illegal plan to defraud property holders of their real estate interests by obtaining such interests in exchange for worthless notes and trust deeds, that he knowingly associated himself with the other conspirators and their illegal scheme, and that he performed functions and contributed efforts in furtherance of such scheme. *See, e.g., Blumenthal* v. *United States*, 332 U.S. 539 (1947); *Hayes* v. *United States*, 329 F.2d 209 (C.A. 8, 1964). That the role of Robert Wagner in the conspiracy may have been subordinate is no defense. *Sabari* v. *United States*, 333 F.2d 1019, 1021 (C.A. 9, 1964).

It is submitted on the basis of the foregoing, that the evidence of guilt against Peter Unger and Robert Wagner is not only sufficient, but overwhelming.

---

[26] Even if the arguments of Robert Wagner and Peter Unger of nonparticipation in every phase of the scheme were accepted, their reckless disregard and indifference as to whether the statements made to victims both orally and in writing were true or false, and their failure to disclose the worthlessness of the securities they peddled, constitute evidence from which the jury could infer that they had participated in the conspiracy charged in Count I. *See, e.g., Elbel* v. *United States*, 364 F.2d 127 (C.A. 10, 1966), *cert. denied*, 385 U.S. 1014.

POINT TWO

The Contentions of John Wagner and Robert Wagner That They Were Prejudiced by Being Tried and Convicted on an Indictment Charging Two Separate Conspiracies When Allegedly Only One Conspiracy, if any, Existed are Unfounded

John Wagner contends that it was error for the trial court to have permitted him to be tried and convicted on two separate conspiracy counts when the evidence at trial allegedly established only one conspiracy, if it established any conspiracy at all (J.W. Br. Pt. F). The question of how many conspiracies are involved in a particular factual situation is simply answered: "[T]he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects." *Braverman* v. *United States*, 317 U.S. 49, 51 (1942). If a single agreement between conspirators exists, no matter how diverse the objects of that agreement, only one conspiracy exists. However, if conspirators enter into more than one agreement, then each separate agreement can constitute a separate conspiracy.

Of course, in resolving a single versus multiple conspiracy question, difficulty usually arises because it is seldom possible to show an express written agreement between conspirators. Conspiracy cases are frequently proven by means of circumstantial evidence, and it is difficult to ascertain from this type of evidence the precise scope and terms of a particular illegal agreement. This difficulty is compounded by the fact that at the time a conspiracy is formed, the conspirators themselves are not always aware of its precise scope, since conspiracies often develop in successive stages. *See, e.g., Blumenthal* v. *United States*, 332 U.S. 539 (1947). Therefore, whether one or several conspiracies existed, and the precise nature or scope of each are properly questions of fact for the jury —the trier of fact. *United States* v. *Dardi*, 330 F.2d 316 (C.A. 2, 1964), *cert. denied*, 379 U.S. 845; *United States* v. *Crosby*, 294 F.2d 928 (C.A. 2, 1961), *cert. denied sub*

nom., Mittelman v. *United States*, 368 U.S. 984 (1962); *Mansfield* v. *United States*, 155 F.2d 952 (C.A. 5, 1946); see *Developments in the Law—Criminal Conspiracy*, 72 Harv.L.Rev. 920, 929-39 (1959); *Note, Federal Treatment of Multiple Conspiracies*, 57 Col.L.Rev. 387, 393 (1957).

It is submitted that the indictment clearly charged, and the jury found, that John Wagner had devised and masterminded an over-all scheme to defraud, and that in carrying out such scheme, he found it necessary to enter into two separate conspiracies, each with different objects, though some of the means were identical. In reaching its conclusions that two separate conspiracies existed and that John Wagner was a member of both, it is obvious that the jury concluded that some of the members of each conspiracy were different since it acquitted Robert Wagner of the Count XIV charge while it convicted him on the Count I charge. The principal object of the Count I conspiracy was to defraud owners of real estate and personal property by obtaining money and property from such victims through the fraudulent means of creating and exchanging worthless paper. In contrast, the principal object of the Count XIV conspiracy was to defraud the United States by concealing from governmental agencies the defendants' looting activities, and the interstate transportation of the fruits of their illegal activities, through the means of filing false written statements with such governmental agencies.

When the issue of single versus multiple conspiracies must be determined, if the evidence viewed in the light most favorable to the government is such that reasonable minds might differ "then the question becomes one of fact for the jury to resolve, and not one of law to be determined by the courts," particularly when the trial court has properly and fully instructed the jury on this issue. *See, e.g., Isaacs* v. *United States*, 301 F.2d 706, 726 n.31, 727 (C.A. 8, 1962), *cert. denied*, 371 U.S. 818. It is important to determine whether the jury was given adequate instructions in this regard in the case at bar. *Cf. United States* v. *Kelly*, 349 F.2d 720 (C.A. 2, 1965), *cert. denied*, 384 U.S. 947; *United States* v. *Borelli*, 336 F.2d 376 (C.A.

2, 1964), *cert. denied sub nom., Cinquegrano* v. *United States,* 379 U.S. 960 (1965). The trial court carefully cautioned the jurors in its instructions prior to the commencement of their deliberations:

> Count I of the Indictment charges all of the defendants named therein with participating in a single, over-all conspiracy. (Tr. 2733)
>
> * * * *
>
> Count XIV charges John C. Wagner and Robert L. Wagner with a conspiracy separate and apart from that charged in Count I. (Tr. 2728)
>
> * * * *
>
> To some extent, the scope of the conspiracy and Overt Acts, set forth in Count 14, overlaps those recited in Count 1, but the impetus of Count 14 is the alleged fraud in connection with properties on which federally-insured mortgages exist. Be very sure that you do not convict on this count unless you find a conspiracy complete and separate from that charged in the first count. You cannot convict any defendants on both counts for the same violations of law. But I would remind you of the general instructions defining a conpiracy given in connection with Count 1, those general instructions also apply to Count 14. (Tr. 2752)
>
> The definition of conspiracy is the same, but the charge is different. (Tr. 2752)
>
> * * * *
>
> Again, I want to repeat that a separate crime or offense is charged in each count of the Indictment. Although evidence introduced may be considered by you in connection with all counts, each offense and the evidence applicable thereto should be considered separately as though no other offense were charged. The fact that you may find some or all of the accused guilty, or not guilty, of one of the offenses charged, should not influence your verdict with respect to any other offense charged. (Tr. 2761)

The judge had read his jury instructions privately to counsel prior to delivering them to the jury. (Tr. 2683-2716)

There were no objections or comments made by any defense counsel with respect to the judge's proposed instructions relating to the two separate conspiracy counts. After the instructions had been given to the jury, neither counsel for John Wagner nor Robert Wagner requested any further instructions relating to Count I or Count XIV, nor did either of them object to any of the instructions given relating to the two conspiracy counts. (Tr. 2770-75)[1]

John Wagner raises the time-worn cry of "*Kotteakos*"[2] in an attempt to bolster his argument that the government purposely fragmented a single conspiracy into illusory multiple conspiracies in order to improve the chances of obtaining a conviction.[3] Thus, although John Wagner claims that he was convicted on multiplicitous conspiracy counts, and that upon the evidence presented the jury could only find one illegal agreement, it is submitted that the jury disagreed with him, as was its prerogative, and, in piecing together the evidence, quite correctly found him to be a guilty participant in two separate conspiracies.[4]

Robert Wagner raises the same multiplicity argument, but with a slightly different twist. (R.W. Br. Pt. IV E) He contends that since the government had a weak case against him it purposely fragmented a single conspiracy charge to enhance the chances of convicting a fringe par-

---

[1] Indeed, the only comment made by any defense counsel relating to the instructions on these counts was a statement by counsel for Peter Unger as to the court's jury instructions relating to Count XIV that the instruction "as such certainly is favorable to John C. Wagner and Robert L. Wagner." (Tr. 277)

[2] *Kotteakos* v. *United States*, 328 U.S. 75 (1946).

[3] This argument brings to mind Judge Friendly's opening statement in *United States* v. *Borelli*, 336 F.2d 376, 380 (C.A. 2, 1964), *cert. denied sub nom., Cinquegrano* v. *United States*, 379 U.S. 960 (1965): "Appellants from conspiracy convictions too often remind us of *Kotteakos* . . . in instances where the reminder is inapposite."

[4] Without conceding that John Wagner's argument has any merit on this point, it should be noted that he received concurrent sentences on the two conspiracy counts, and thus could not in any event be prejudiced by multiplicity.

ticipant by providing the jury the opportunity to reach a compromise verdict. The argument on sufficiency of evidence contained in Point One belies his contention of fringe participation. As discussed above, the jury properly found that two conspiracies existed. It is submitted that the trial court quite properly denied Robert Wagner's motion to dismiss Count XIV prior to submission of the case to the jury because, in considering "the evidence in the light most favorable to the government . . . together with the inferences which may be reasonably drawn from the facts," there was "substantial evidence upon which a jury might reasonably base a finding that the accused is guilty beyond a reasonable doubt." Rule 29(a), F. R. Crim. P. In this connection, it is a "principle *universally recognized*, that if the evidence in light most favorable to the government is such that reasonable minds 'might differ' then the question becomes one of fact for the jury to resolve, and not one of law to be determined by the courts." *Issacs* v. *United States*, 301 F.2d 706, 726-27 (C.A. 8, 1962), *cert. denied*, 371 U.S. 818 (Emphasis added).

Moreover, the assertion that conviction of a defendant on one count and his acquittal on another establishes that a "compromise verdict" was reached is an obvious *non-sequitur*. To accept this fallacious reasoning would preclude a court from ever trying a defendant on more than one count. Therefore, a reversal of the convictions in this case based upon a finding that John Wagner and Robert Wagner have been prejudiced by being improperly charged and convicted on multiple conspiracy counts would, in effect, preclude effective prosecutions of participants in complex financial conspiracies. If the government obtains a conviction on a single integral conspiracy theory, the defendants will claim that multiple conspiracies should have been charged and will ask for reversal based upon *duplicity*, while if the government alleges, proves, and obtains convictions on multiple conspiracies, the defendants, as here, will maintain that a single, over-all conspiracy should have been charged, and will ask for reversal based

upon *multiplicity*. That the law of conspiracy should not be subjected to such a dilemma is indicated by the following words of Judge Learned Hand, in *United States* v. *Cohen*, 145 F.2d 82, 88 (C.A. 2, 1944):

> It is particularly unreasonable for the accused to object that all their misdeeds should be brought to light when they so inextricably confused them themselves; i.e., to complain of that confusion of which they were the authors. *It is a strange conception of justice that, if one only tangles one's crimes enough, one gets an immunity because the result is beyond the powers of a jury to unravel.* (Emphasis added)

POINT THREE

Joinder of Offenses and of Defendants Was Proper and the Trial Court Did Not Abuse Its Discretion in Denying the Motions for Severance

A. *Joinder of Offenses and of Defendants Was Proper*

Both John Wagner and Peter Unger raise as reversible error an alleged misjoinder of offenses and defendants. (J.W. Br. Pt. A; P.U. Br. Pt. A) It is submitted that the provisions of Rule 8(a), Fed. R. Crim. P., relating to joinder of offenses, and the provisions of Rule 8(b), Fed. R. Crim. P., relating to joinder of defendants, were complied with and that defendants' misjoinder arguments have little merit.

Rule 8(a) provides for the joinder of several charges against a defendant if the offenses charged "are of the same or similar character or are based on the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or plan." It is common practice, particularly in securities fraud and mail fraud prosecutions, to join in one trial a conspiracy count along with separate substantive securities fraud and mail fraud counts committed in furtherance of such conspiracy. *See, e.g., Davenport* v. *United States*, 260 F.2d 591 (C.A. 9, 1958), *cert. denied*, 359 U.S. 909 (1959).

Counts II through XIII contained substantive securities fraud and mail fraud charges of "the same or similar character" and were committed in furtherance of the "common scheme or plan" alleged in Count I as the conspiracy to commit securities fraud and mail fraud. Consequently, Rule 8(a) was fully complied with by the court in allowing Counts I through XIII to be tried jointly against John Wagner. Similarly, Counts XV, XVI and XVII were substantive offenses of making false statements and transporting stolen property committed in furtherance of the "common scheme or plan" alleged in Count XIV as a separate conspiracy to defraud agencies of the United States, to make false statements to government agencies and to transport stolen funds interstate. Thus, joinder of Counts XIV, XV, XVI and XVII was also entirely proper.

The only remaining issue as to misjoinder of offenses is whether it was proper to litigate in one trial the two conspiracies with their related substantive offenses. It is submitted that such joinder was entirely proper under Rule 8(a) since both conspiracies and the substantive offenses related to each were all based on "acts or transactions connected together or constituting parts of a common scheme or plan." The evidence adduced at trial shows that defendant John Wagner masterminded and directed the over-all scheme to defraud victims into exchanging their properties for worthless paper, and that in pursuing this scheme he entered into two separate conspiracies to accomplish his aims. The evidence introduced at trial to prove the conspiracy to file false statements with the F.H.A. and the S.B.A. overlapped that used to prove part of the conspiracy to commit mail fraud and securities fraud charged in Count I. Thus, evidence of the manner in which the defendants gained control of the Puebloan Motor Inn and the Hollywood Towne House, and "milked" the revenues and income from the Hollywood Towne House and converted such monies to their own personal use was relevant to proof of both of the conspiracies charged. In fact, some of the defendants' activities with respect to

the Puebloan Motor Inn and the Hollywood Towne House were even specified as overt acts in the conspiracy charged in Count I.

In this connection, the test for whether joinder of offenses is proper involves a weighing of the possible prejudice to the defendants against the public interest in avoiding duplicitous, time-consuming trials in which the same factual and legal issues must be litigated. *United States* v. *Haim*, 218 F.Supp. 922 (S.D.N.Y. 1963). When the trier of fact will be in a position to separate out the facts and law applicable to each count, joinder of offenses is proper. *United States* v. *Kahn*, 381 F.2d 824 (C.A. 7, 1967); *Daly* v. *United States*, 342 F.2d 932 (C.A. D.C., 1964); *Drew* v. *United States*, 331 F.2d 85, 91 (C.A. D.C., 1964). The defendants, both prior to trial and now on appeal, failed to make any showing that the trial judge's denial of their misjoinder motions was incorrect. The jury's ability to separate and keep distinct the evidence and the law relating to each count, in accordance with the trial judge's precise limiting instructions on this point, is clearly demonstrated by its acquittal of Robert Wagner on the second conspiracy. In a closely analagous Securities Act and mail fraud prosecution which also involved separate charges of making false statements to the SEC in violation of 18 U.S.C. 1001, *United States* v. *Steel*, 38 F.R.D. 421 (S.D.N.Y. 1965) where the court held that there was no misjoinder in a 22 count indictment [1] against two defendants, although the offenses were different, it found that the false statements were made to the SEC in furtherance of the overall scheme or plan, and that the proof to be introduced at trial would be relevant to all three groups of charges.

This then leaves for determination the issue of whether the defendants were properly joined for trial under the permissive provisions of Rule 8(b). That rule authorizes

[1] Count I alleged a conspiracy to violate the Securities Act and the Mail Fraud Statute, Counts II through XI alleged substantive Securities Act crimes committed in furtherance of the conspiracy, and Counts XII through XXII alleged substantive counts of false statements made to the SEC.

joinder of defendants if the indictment alleges that the defendants participated "in the same series of acts or transactions constituting an offense or offenses," and expressly states that joinder is proper even though each defendant is not charged in each count. In construing Rule 8(b), the courts have clearly held that joinder of defendants is proper even though all are not charged in each count, *Schaffer* v. *United States*, 362 U.S. 511 (1960); *United States* v. *Steel*, 38 F.R.D. 421 (S.D.N.Y. 1965), and even though all have not participated equally in the offenses charged, *United States* v. *Bryant*, 264 F.2d 598, 603 (C.A. 4, 1966); *Ader* v. *United States*, 284 F. 13 (C.A. 7, 1922).

As the court stated in *Haggard* v. *United States*, 369 F.2d 968, 973 (C.A. 8, 1966), "Broad interpretation of Rule 8(b) is undoubtedly encouraged in the interests of more efficient administration of criminal trials." In *Haggard*, a total of six defendants were charged in various counts of the indictment, but Haggard was the only defendant named in each count. The indictment charged Haggard, Alley and another defendant in a conspiracy count, and charged Haggard in all, but Alley in only 3 of the 13 substantive counts. On appeal, Alley claimed misjoinder under Rule 8(b). In its examination of the indictment, the court found that Haggard was a common participant throughout all counts (as was John Wagner in the instant case); that each of the charges implied a "clear discernible pattern of action" involving each of the other defendant's assisting Haggard, the prime defendant, in the "same series of transactions" (similarly, in the instant case, Robert Wagner and Peter Unger assisted John Wagner in his over-all scheme to defraud); that the indictment invited "joint proof" (just as in the instant case, proof concerning many of the real estate transactions jointly implicated the three appellants); and concluded that under these circumstances, prima facie joinder was shown. Applying the *Haggard* rationale, it is submitted there was no misjoinder in the case at bar. *Cf.*, *Davenport* v. *United States*, 260 F.2d 591 (C.A. 9, 1958), *cert. denied*, 359 U.S. 909 (1959).

B. *The Trial Court Did Not Abuse Its Discretion in Denying the Motions for Severance*

Even where joinder of offenses and of defendants is proper under Rule 8, Rule 14, Fed. R. Crim. P., recognizes the possibility of prejudice resulting therefrom, and provides that where it appears that either a defendant or the government is prejudiced by such joinder, "the court *may* order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." (Emphasis added.) The granting or denying of a motion for severance rests in the sound discretion of the trial court and is a matter which is not reviewable except for a clear abuse of discretion. *Opper* v. *United States*, 348 U.S. 84 (1954); *Davenport* v. *United States*, 260 F.2d 591 (C.A. 9, 1958), *cert. denied*, 359 U.S. 909 (1959); *Shockley* v. *United States*, 166 F.2d 704 (C.A. 9, 1948), *cert. denied*, 334 U.S. 850. Severance is properly denied unless the defendant makes a clear-cut showing of prejudice, even where there has been a failure of proof or dismissal of the sole count justifying joinder. *Schaffer* v. *United States*, 362 U.S. 511 (1960); *United States* v. *Aiken*, 373 F.2d 294 (C.A. 2, 1967); *Fernandez* v. *United States*, 329 F.2d 899 (C.A. 9, 1964), *cert. denied*, 379 U.S. 832. Moreover, defendants are not entitled to separate trials merely because of unequal proof, *United States* v. *Sherman*, 84 F.Supp. 130 (E.D.N.Y. 1947), because of the expense of a joint trial, *United States* v. *Van Allen*, 28 F.R.D. 329 (S.D.N.Y. 1961), because some defendants are named in only a few counts, *United States* v. *Nomura Trading Co.*, 213 F.Supp. 704 (S.D.N.Y. 1963), because some defendants have a lesser role in the crime than other defendants, *West* v. *United States*, 311 F.2d 69 (C.A. 5, 1962), because the defendants may be hostile to each other, *Allen* v. *United States*, 202 F.2d 329 (C.A. D.C. 1952), or because defendants have different but not antagonistic defenses, *United States* v. *Fujimoto*, 102 F.Supp. 890 (D. Hawaii 1952).

The "shot-gun" showing of purported prejudice made by John Wagner (J.W. Br. Pt. A) and Peter Unger (P.U.

Br. Pt. H) is wholly insufficient to establish that the trial court abused its discretion in denying the motions for severance. Here, the indictment charged and the evidence convincingly established that John Wagner, Peter Unger and Robert Wagner actively participated in the implementation of a fraudulent scheme. That each one's involvement in the fraudulent activities may have occurred at different times and different places, and that each one contributed to the implementation of the fraudulent scheme in a somewhat different way, does not establish that any of them was prejudiced by not having a separate trial. When multiple defendants are charged with engaging in a scheme to defraud, a joint trial "not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete over-all view of the whole scheme and helps them to see how each piece fits into the pattern." *Rakes* v. *United States*, 169 F.2d 739, 744 (C.A. 4, 1948). The fact that some of the defendants play only "a very small part in wrong-doing as compared with others does not reasonably entitle them to separate trials." *Ader* v. *United States*, 284 F. 13 (C.A. 7, 1922). Also, although Peter Unger has claimed prejudice based upon the possibility that the jury may have been confused by the presentation of evidence on counts in which he was not named a defendant, such a general unsupported assertion of prejudice does not justify a severance. *Williamson* v. *United States*, 310 F.2d 192 (C.A. 9, 1962).

It is submitted that the decision of this Court in *Davenport* v. *United States*, 260 F.2d 591 (C.A. 9, 1958), *cert. denied*, 359 U.S. 909 (1959), is controlling on the issues of joinder and severance presented in the instant case. In *Davenport*, nine defendants were charged by indictment with one count of conspiracy to violate the Mail Fraud Statute and the anti-fraud provisions of the Securities Act of 1933, and all of the defendants except Davenport and another were charged with twelve counts of substantive violations of those statutes; Davenport was named in only 4 of 40 overt acts alleged in the conspiracy count. After examining the record and finding that the trial court care-

fully distinguished the charges and the defendants for the jury, the court held, "We see no reason to interfere with the trial Court's discretion [in denying Davenport's motion for severance], as we find that no prejudice was suffered by the appellant." 260 F.2d at 595. A similar examination of the record on this appeal shows that the trial court constantly admonished the jury to consider the guilt or innocence of each defendant solely upon the evidence introduced at trial against him, and to determine its verdicts separately as to each defendant, pursuant to the trial court's careful and detailed instructions. As the *Davenport* court stated, in citing from *Dowdy* v. *United States*, 46 F.2d 417, 421 (C.A. 4, 1931):

> Where two or more defendants are indicted for a joint transaction, it is inadvisable to split up the case into many parts for separate trials, in the absence of very strong and cogent reason therefor. This is especially true in conspiracy charges, from the very nature of the case.

In the instant case, the defendants rely upon *Drew* v. *United States*, 331 F.2d 85 (C.A. D.C., 1964) in claiming prejudice by virtue of the introduction of evidence which failed to meet the "other crimes test." *Drew*, however, involved joinder of distinct and separate offenses which were neither parts of "a common scheme or plan" nor parts of the "same act or transactions or the same series of acts or transactions," and therefore is inapposite. In addition, John Wagner raises two strained arguments to bolster his contention that a joint trial severely prejudiced him: first, citing *Echeles* v. *United States*, 352 F.2d 892 (C.A. 7, 1965), that he was denied the opportunity to call his co-defendants as his defense witnesses; and second, that he was prejudiced by the introduction into evidence of Peter Unger's statements to government officers which allegedly incriminated him. The first argument is patently spurious since both of his remaining co-defendants, Robert Wagner and Peter Unger, did take the stand, and he had ample opportunity to examine them if he so desired. Moreover, *Echeles* is inapposite since no showing has ever

been made by John Wagner that any of his co-defendants ever made any prior statements exculpating him. The second argument is also without merit because no objection was made at trial to the introduction of Peter Unger's statements, and even if such objection had been interposed, the statements were still admissible since Peter Unger took the stand and was available for cross-examination by John Wagner. *Cf. Bruton* v. *United States*, 391 U.S. 123 (1968); *United States* v. *Levinson*, . . . F.2d . . . (C.A. 6, Nos. 18204 et seq., Dec. 30, 1968).

It is obvious that if severances had been granted in the instant case, three separate trials in which the evidence would be almost identical would needlessly have been required. *Cf. United States* v. *Van Allen*, 28 F.R.D. 329, 339 (S.D.N.Y. 1961). The mere fact that the defendants might have had a better chance of acquittal if tried separately does not constitute grounds for severance. *Robinson* v. *United States*, 210 F.2d 29 (C.A. D.C., 1954). As Judge Augustus Hand astutely observed in *United States* v. *Fradkin*, 81 F.2d 56, 59 (C.A. 2, 1935):

> A man takes some risk in choosing his associates, and if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats.

POINT FOUR

The Trial Court Did Not Abuse Its Discretion in Denying the Motions for Change of Venue

Peter Unger urges as error the denial of his pre-trial motion for change of venus pursuant to Rule 21(b), Fed. R. Crim. P., alleging that his indigency, his residence, the probable length of the trial, and the residence of the majority of witnesses compelled the transfer of the proceedings to the United States District Court for the Southern District of California. (C.T. 100-101) (P.U. Br. Pt. B) Similarly, John Wagner also filed a pre-trial motion for change of venue, with a supporting affidavit, alleging that the indictment charged offenses in different districts,

the overwhelming majority of which were not within the jurisdiction of the District Court of Oregon, and that his residence, the residences of the majority of witnesses, and his indigency, purportedly depriving him of paid counsel of his choice, required transfer of the proceeding to the United States District Court for the Southern District of California. (C.T. 109-12) On appeal, he reasserts the allegations contained in the pre-trial motion and affidavit, and claims that those allegations were borne out by the trial. (J.W. Br. Pt. C)

Unless the defendants show that trial in the district selected by the prosecution would be "unduly burdensome" and unfair, *United States* v. *United States Steel Corp.*, 233 F.Supp. 154, 157 (S.D.N.Y. 1964); *United States* v. *Jessup*, 38 F.R.D. 42 (M.D.Tenn. 1965), or establish that the "substantial balance of inconvenience" requires transfer, then transfer is not warranted, *United States* v. *Luros*, 243 F.Supp. 160, 173-74 (N.D.Iowa 1965).

> [N]o matter where [the] trial is conducted, there will be inconvenience to the parties, . . . , their counsel and their witnesses. But mere inconvenience, interference with one's routine occupational and physical activities, and other incidental burdens which normally follow when one is called upon to resist a serious charge do not *ipso facto* make the necessary showing that a transfer is required in the interest of justice. *United States* v. *Luros*, 243 F.Supp. at 174.

The defendants have failed to make the necessary showing of "a substantial balance of inconvenience" to themselves, or that a trial in Oregon would be "so unduly burdensome" that transfer to the Southern District of California was warranted. Of the 155 total transactions, including overt acts, alleged in the indictment, 96 involved a substantial nexus with Oregon.[1] Moreover, prior to trial, the government made available for the use and convenience of defense counsel lists of 244 proposed government

[1] Of the 84 transactions alleged in Counts I through XVII, encluing Count XIV, 31 involved a substantial nexus with Oregon. Count XIV alleged 71 overt acts, 65 of which occurred in Oregon.

witnesses, 99 of whom were from Oregon. That a large plurality of the witnesses resided in Oregon and not, as alleged, in Southern California, was borne out by the fact that of the 108 government witnesses who testified during the 14-day trial, 37 were from Oregon, 14 from Northern California, 19 from Southern California, 17 from Hawaii, 7 from Nevada, 5 from Arizona, and 4 from other states. Obviously, the District of Oregon, where a very substantial number of transactions had their nexus and where a large plurality of the witnesses resided, clearly was a more convenient and less expensive forum than the Southern District of California for the government and the witnesses.

While the defendants' residences are a consideration,[2] there is no constitutional right to trial in a home district. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964); *United States* v. *Luros*, 243 F.Supp. 160, 174-75 (N.D.Iowa, 1965). In addition to defendants' residences and their indigency, with its purported effects,[3] in deciding a motion for a change of venue, the court must also consider the residence of witnesses, the location of books, records and other exhibits, and the rights of and costs to the government. *See Platt* v. *Minnesota Mining and Mfg. Co.*, 376 U.S. 240 (1964); *United States* v. *Jessup*, 38 F.R.D.

---

[2] In his April 24, 1967 sworn statement of financial status, John Wagner listed his residence as New Orleans, Louisiana. (C.T. 119) He obviously would have incurred expense and inconvenience of traveling to either Oregon or Southern California.

[3] In light of his April 24, 1967 sworn statement of financial status showing absolutely no income and no real or other property (C.T. 119-20), John Wagner's contradictory allegation that denial of transfer caused his indigency and deprived him of counsel he was able to pay, is shown to be without substance. *See* POINT SIX, *infra.* John Wagner's further allegation that denial of transfer resulted in his lack of an affirmative defense, purportedly because he was unable to subpoena witnesses, is also without merit, particularly in light of the government's frequently proffered cooperation in making available broad discovery to defense counsel long before trial, government witness lists, and government facilities for interviewing proposed witnesses for both the government and the defense. *See* POINT FIVE, *infra.*

42 (M.D.Tenn. 1965); *United States* v. *Luros*, 243 F.Supp. 160 (N.D.Iowa, 1965).

Those cases cited by John Wagner to support his assertion that the trial court erred in denying his motion for change of venue clearly do not satisfy his burden of demonstrating the trial court's alleged abuse of discretion under the facts and circumstances of the instant case. In *United States* v. *Jessup*, 38 F.R.D. 42 (M.D.Tenn. 1965), the court held that trial in a Tennessee District Court for mail fraud would impose substantial hardship on the defendants for the reasons that (1) the defendants were residents of Mississippi and would have to incur considerable expense traveling to and remaining in Tennessee for the trial; (2) the majority of the defendant's witnesses were residents of Mississippi and transporting them to Tennessee would have involved considerable expense and inconvenience to them and to the defendants; (3) the corporate vehicle for the alleged fraud, including its books and records, were located in Mississippi and transporting those materials to Tennessee would have involved some expense and inconvenience to the defendants; (4) immovable objects located in Mississippi could not be viewed by a jury sitting in Tennessee; (5) the interruption of the operation of defendant's business located in Mississippi would cause the defendants great losses and serious financial hardships; and (6) the bulk of the alleged offenses were committed in Mississippi. 38 F.R.D. at 45-48.

In *United States* v. *West Coast News Co.*, 30 F.R.D. 13 (W.D.Mich. 1962), another case cited by John Wagner, the court held that it would *not* be in the interest of justice to transfer an obscenity prosecution from Michigan, the district where the obscene materials were delivered and distributed, to California, the district where the materials were published, the individual defendants resided, and the corporate defendant was located, even though the defendants and their witnesses would have to travel from California to Michigan for the trial. In balancing the countervailing considerations of convenience and expense to all parties involved, the court observed that "if this action

were transferred [from Michigan to California], the government's witnesses would be required to travel from this district to California. *It is obvious that no district will be convenient for all of the witnesses in this action.*" 30 F.R.D. at 24 (emphasis added).

Travis v. *United States*, 364 U.S. 631 (1961), another case cited by John Wagner, is distinguishable because the Court did not reach the issue of which district would be the most convenient for trial, since it held that the trial court had no discretion under the applicable statute to transfer the false filing prosecution.

Finally, in *United States* v. *Luros*, 243 F.Supp. 160 (N.D.Iowa, 1965), the court first observed that:

> The importance of assuring good order in the management of judicial business and efficient handling of a prosecuting attorney's case load, requires that a defendant demonstrate a substantial balance of inconvenience to himself if he is to succeed in nullifying this prerogative [of the prosecution to make the initial choice of venue]. 243 F.Supp. at 174 (citations omitted).

and then considered defendants' three allegations of specific hardships that they would be unable to conduct their businesses and to meet their family responsibilities, they would be physically and economically taxed if required to transport themselves, their attorneys and their witnesses to Iowa, and that their living expenses in Iowa during trial would be "staggering," all required transfer of the obscenity prosecution from Iowa to Southern California. The court, in denying transfer, balanced the necessarily increased burdens defendants would have to bear during a trial in Iowa with the countervailing considerations of inconvenience and expense to government witnesses, most of whom were from Iowa, and the right of residents of a district where obscene materials are distributed to protect themselves therefrom without having to wait for a prosecutor in another district to see fit to act. 243 F.Supp. at 174-78.

It is apparent from this examination of the cases cited by John Wagner that the trial court's denial of the motions for change of venue in the instant case was a proper and sound exercise of judicial discretion. The cumulative and compelling factors present in *Jessup* are clearly not present here. *Travis* is clearly inapposite to the instant matter because the trial court had no discretion to transfer that prosecution in the face of statutory and regulatory requirements that venue was proper in only one district. The obscenity cases of *West Coast News* and *Luros*, demonstrating the balancing process involved in the trial court's implementation of the policy of minimizing inconvenience to *all* parties, clearly show that the increased burdens to defendants normally necessitated by a prosecution away from "home" must be substantial and undue to warrant transfer in view of countervailing burdens to the government, government witnesses, and the public if removal were granted, and that the defendants must establish more than that another district would be more convenient for them to persuade the trial court to grant transfer.

While it may have been more convenient for Peter Unger and John Wagner, and for John Wagner's California counsel, to be tried in the Southern District of California, such a showing is insufficient to warrant transfer, particularly when the countervailing considerations of convenience to the government and to the large plurality of witnesses militated most persuasively against removal from the District of Oregon. Even assuming *arguendo* that the reasons for Southern California venue were as compelling as the reasons for Oregon venue, the defendants' showing would still fail to establish a substantial balance of inconvenience or that the trial court abused its discretion in denying their motions for transfer. *United States* v. *Aronson*, 319 F.2d 48, 52 (C.A. 2, 1963), *cert. denied*, 375 U.S. 920; *see United States* v. *West Coast News*, 30 F.R.D. at 24.

John Wagner now argues for the first time that publicity, both pre-trial and during the course of the trial, re-

quired transfer under Rule 21(a), Fed. R. Crim. P. Logically, where prejudicial pre-trial publicity prevents a fair and impartial trial in the district, the appropriate motions are for change of venue or for a continuance; but where prejudicial publicity after commencement of the trial prevents a fair and impartial trial, the appropriate motions are for a mistrial or for a continuance. Therefore, it is submitted that making this argument for the first time on appeal is untimely and tardy, *cf. United States* v. *Tremont*, 351 F.2d 144 (C.A. 6, 1965), *cert. denied*, 383 U.S. 944, and that the failure to raise the argument in a motion for change of venue either before the trial commenced or within a reasonable time thereafter constituted a waiver thereof under Rule 21(a), within the meaning of Rules 22, 12(b)(2) and 12(b)(3), Fed. R. Crim. P. *Cf. United States* v. *McMaster*, 343 F.2d 176 (C.A. 6, 1965), *cert. denied*, 382 U.S. 818.

Under Rule 21(a), the trial court necessarily exercises a broad discretion in determining whether publicity renders a trial in the district unfair. It is well-established that the trial court's determination should be overturned only upon a clear showing of prejudice which demonstrates an abuse of discretion. *E.g., United States* v. *Moran*, 236 F.2d 361 (C.A. 2, 1956), *cert. denied*, 364 U.S. 887. Therefore, even if the publicity argument were properly raised with respect to the venue issue, the trial court did not abuse its discretion in denying the motion for transfer on the grounds of pre-trial publicity. The mere existence of pre-trial publicity is not decisive under Rule 21(a). *Kersten* v. *United States*, 161 F.2d 337 (C.A. 10, 1947), *cert. denied*, 331 U.S. 851; *see Shockley* v. *United States*, 166 F.2d 704 (C.A. 9, 1948), *cert. denied*, 334 U.S. 850. There is no denial of a fair trial where pre-trial publicity is factual rather than inflammatory, and has significantly diminished for a period of time before trial. *See Beck* v. *Washington*, 369 U.S. 541 (1962); *Beck* v. *United States*, 298 F.2d 622 (C.A. 9, 1962), *cert. denied*, 370 U.S. 919.

In the instant case, the trial court recognized as early as three and one-half months before trial that "this case

has been singularly free of publicity in the last six or eight months since the original splash." (Pre-Tr. 2840, March 30, 1967) In fact, there were only four days on which articles involving any aspect of the case appeared in the Portland newspapers between the time the return of the indictment was reported and the first day of trial: March 11, 1967; April 24, 1967; April 25, 1967; and July 1, 1967. (J.W. Br. Exs. 5-9) An examination of these articles indicates that they were devoted almost exclusively to factual and accurate reports on the foreclosure of the Hollywood Towne House and only incidentally, if at all, mentioned the indictment or the forthcoming trial. There could have been no showing of prejudice in the district before trial because there simply was none. The trial court was satisfied that the defendants could obtain a fair and impartial trial there. Under these facts and circumstances, even if John Wagner had made a motion for transfer because of prejudice in the district, the trial court's denial of transfer would have been a most proper exercise of judicial discretion.

POINT FIVE

The Trial Court Properly Refused to Grant John Wagner, in the Absence of an Adequate Showing of Necessity, Government Funds for Investigatory Purposes, Unlimited Subpoenaing of Witness at Government Expense, and an Allegedly Requested Continuance

John Wagner makes the broad-brush contention that the trial court's denial of his motion and requests for investigatory funds totaling $3,000 and for the issuance of more than 300 subpoenas at government expense deprived him of due process of law and effective assistance of counsel. (J.W. Br. Pt. E) Rule 17(b), Fed. R. Crim. P., as amended in 1966, authorizes the Court to issue subpoenas to a defendant at government expense only "*upon a satisfactory showing* that the defendant is financially unable to pay the fees of the witnesses and *that the presence of the*

witnesses is necessary to an adequate defense." (Emphasis added)[1]

It is well-settled that the right afforded by Rule 17(b) is not absolute, but rather is committed to the sound discretion of the trial court. *Thompson* v. *United States*, 372 F.2d 826, 828 (C.A. 5, 1967); *United States* v. *Zuideveld*, 316 F.2d 873, 881 (C.A. 7, 1963), *cert. denied*, 376 U.S. 916; *Murdock* v. *United States*, 283 F.2d 585, 587 (C.A. 10, 1960), *cert. denied*, 366 U.S. 953 (1961); *see Barnes* v. *United States*, 374 F.2d 126, 128 (C.A. 5, 1967); *Gevinson* v. *United States*, 358 F.2d 761, 766 (C.A. 5, 1966), *cert. denied*, 385 U.S. 823. It is also clear that in exercising its discretion, the trial court must explore the request thoroughly and carefully not only to protect the defendant's rights under the rule and under the fifth and sixth amendments, but also to screen out frivolous requests for witnesses and to prevent "useless or abusive issuance of process", *United States* v. *Zuideveld*, 316 F.2d 873, 881 (C.A. 7, 1963), *cert. denied*, 376 U.S. 916 (425 witnesses requested); *Murdock* v. *United States*, 283 F.2d 585, 587 (C.A. 10, 1960), *cert. denied*, 366 U.S. 953 (1961), and "fishing expeditions," *cf. United States* v. *Smith*, 209 F.Supp. 907 (D.Ill. 1962); *United States* v. *Hanlin*, 29 F.R.D. 481 (D.Mo. 1962). Consequently, it has been clearly established that the trial court's exercise of that discretion will not be disturbed by an appellate court unless exceptional and compelling circumstances clearly indicate an abuse of discretion. *Thompson* v. *United States*, 372 F.2d 826, 828 (C.A. 5, 1967); *Taylor* v. *United States*, 329 F.2d 384, 386 (C.A. 5, 1964); *United States* v. *Zuideveld*, 316 F.2d 873, 881 (C.A. 7, 1963), *cert. denied*, 376 U.S. 916; *see Reistoffer* v. *United States*, 258 F.2d 379, 396 (C.A. 8, 1958), *cert. denied*, 358 U.S. 927.

It is submitted that an examination of the record demonstrates that the trial court carefully considered John

---

[1] Even prior to amendment, Rule 17(b) required a satisfactory showing that the requested witnesses would be "material to the defense." The new amendments to Rule 17(b) changed only the procedure for obtaining subpoenas, not the substance of the rule's requirements.

Wagner's requests for the issuance of subpoenas at government expense, and that its refusal to order more than 13 subpoenas was a proper exercise of judicial discretion. However, since John Wagner's presentation of this issue in both his original and supplemental briefs is filled with distortions and inaccuracies, the government feels compelled to summarize the actual facts in the record. The first request for funds and subpoenas was made on June 26, 1967. Counsel for John Wagner had been provided with a list of proposed government witnesses, had decided that he and his client wished to interview approximately 52 of them, and asked the court for approximately $3,000 so that they could travel to interview such persons. (Pre-Tr. 3-4, June 26, 1967) Since it was anticipated that the government would call these persons as witnesses at the trial, the court, in attemping to prevent a waste of government money, suggested that rather than granting the defendant and his counsel government funds to interview such persons, the defendant and his counsel would be able to interview them prior to their testimony as government witnesses during the trial. (Pre-Tr. 7-8, June 26, 1967) In order to assist the defendants in this regard, prior to trial the government completely opened up its files with regard to these witnesses, and gave the defendants absolute discovery of all witnesses statements, digests of anticipated testimony, and all documents relevant to such anticipated testimony. (Pre-Tr. 10-11, June 26, 1967; Pre-Tr. 15, July 10, 1967) Such pre-trial discovery, to which the defendants had no right at all, was intended to assist the defendants in determining which witnesses to be called by the government might be helpful as defense witnesses.

On July 6, 1967, John Wagner's attorney requested the Clerk of the Court to issue subpoenas for 325 defense witnesses to appear both for pre-trial questioning, and for purposes of testifying at the trial. (C.T. 134-43) The Clerk, however, advised defense counsel that such subpoenas would be issued in blank, but that if he wished the government to pay the witness fees, an order from the court pursuant to Rule 17(b) was required. (C.T. 132)

On July 10, 1967, defense counsel filed an "Affidavit and Motion for Issuance of Subpoenas" requesting that the court subpoena at government expense 65 defense witnesses for the trial. The court indicated that the motion on its face was an unreasonable request for expenditure of government funds, and ruled that the motion was not accompanied by an adequate showing that each one of the 65 requested witnesses was necessary for an adequate defense. (Pre-Tr. 8-9, July 10, 1967) The Court added that a proper determination of whether the requested witnesses would be "necessary" could probably not be made until the trial progressed. This observation of the trial court that the request was premature was substantiated when another defense attorney, who had joined in the motion, admitted that most of the 65 requested witnesses were prospective rebuttal witnesses. (Pre-Tr. 10, July 10, 1967) Once again the trial court assured defense counsel that they would be afforded the opportunity to subpoena at government expense those witnesses that they could demonstrate were necessary to an adequate defense, but expressed its dissatisfaction with the superficial showing of necessity contained in the motion papers. (Pre-Tr. 10-14, July 10, 1967) Finally, recognizing that defense counsel would not need rebuttal witnesses for at least three weeks, the trial court admonished that "I think a more adequate showing will have to be required." (Pre-Tr. 17, July 10, 1967) Although the trial court indicated its availability to hear any supplemental showing of "necessity" that could be made (Pre-Tr. 19, July 10, 1967), neither John Wagner nor his attorney ever made any further effort to establish the requested showing of necessity.

On July 12, 1967, John Wagner's attorney again requested government funds to finance the pre-trial interview of more than 300 defense witnesses. (C.T. 157-62)

On July 19, 1967, the second day of trial, the court was willing to require that a witness subpoenaed but not used by the government remain at the trial and be available to be called as a defense witness, but John Wagner's attorney refused to make any showing whatever of "necessity" with

regard to such witness. (Tr. 69-70) At the court's suggestion, the government indicated its willingness to call the witness in order to alleviate any problems. (Tr. 71-72)

On July 25, 1967, the court admonished defense counsel that in asking for issuance of subpoenas at government expense, the attorneys had an obligation to the court to request subpoenas for only those witnesses that defendants "really need." (Tr. 1035-38) Nevertheless, the court granted, in part, defense counsel's request for subpoenas at government expense when he instructed that 13 subpoenas be made available for defense counsel without any further showing of necessity. (Tr. 1037)

On July 31, 1967, the Court discussed with counsel the procedures to be followed in arguing defense motions the next day at the close of the government's case-in-chief, and in proceeding thereafter to hear witnesses for the defense. John Wagner's attorney, who represented that he had defense witnesses standing by,[2] expressed his view that defense motions could "take quite a bit of time and might affect the schedule of the Court." (Tr. 2115) Another defendant's attorney had just previously informed the court that he might want to call a defense witness out of order. (Tr. 2113) In considering these and other matters brought to its attention, the court stated:

> As a matter of fact, there might be some problem in putting even on [*during the next day's session*] the one witness you [*the other defendant's attorney*] have in mind because of the time consumption involved [*in making defense motions*], unless, of course, everybody wants to agree that we put him [*the other defendant's witness*] on out of order. (Tr. 2115) (Emphasis added)

In proper context, these remarks of the trial court exemplify the careful consideration it gave to the defendants and their counsel throughout the course of the trial. John Wagner's allegation that the trial court made these remarks "when appellant's attorney located one witness

---

[2] Ultimately, John Wagner called no defense witnesses.

without government funds," (J.W. Br. at 53-54(13)), is a preposterous distortion of the record. His quotation of the remarks out of proper context constitutes an unjustified attempt to cast doubt upon the integrity and fairness of the trial court.

During a later *ex parte* proceeding on July 31, 1967, attended only by John Wagner and his attorney in the trial court's chambers, John Wagner's attorney stated for the record the difficulties he was encountering in interviewing, and even locating by telephone persons he and his client apparently considered potential defense witnesses. (Tr. 2118-19, 2122-24) Several of his remarks were most revealing:

> We will state for the record that I have tried to contact witnesses, and quite frankly, Your Honor, *some of the witnesses, have not indicated to me on the phone what they were thought by my client to be indicating.* (Tr. 2122-23) (Emphasis added)

When John Wagner's attorney did mention that he was attempting to reach several witnesses who possibly could testify to what were relevant and material facts, the trial court, indicating in substance that any reasonable showing of necessity would be sufficient to obtain subpoenas and that no affidavit need be made, stated:

> Well, first of all, on any reasonable request, certain subpoenas will be issued for any of these witnesses that you mentioned, without any affidavit or anything else. (Tr. 2124)

The attorney answered "Okay," and then stated that the requests would probably be made the next morning. However, no requests were ever made for the witnesses mentioned during the proceeding; and, other than the usual conclusionary and unsupported claims indicating testimony John Wagner desired or expected, no showing of necessity was ever attempted for any proposed witness.

On August 1, 1967, John Wagner's attorney read into the record a long recitation of the results of his telephone

contacts with proposed witnesses,[3] but made no attempt at this or at any other time to make any showing at all that any proposed witness was necessary to an adequate defense. (Tr. 2394-99)

The foregoing examination of the record, fairly presented, indicates that it was the failure of John Wagner and his counsel to make a reasonable showing of "necessity," not an abuse of discretion by the trial court, that formed the basis of the court's decision to refuse to issue at government expense subpoenas in addition to the 13 that had been issued. The fact that none of the 13 witnesses so subpoenaed were ever called by John Wagner to testify indicates that the court's refusal to issue additional subpoenas was indeed proper.[4]

None of the cases cited by John Wagner on this issue in his brief are apposite to the instant case. In *Greenwell* v. *United States*, 317 F.2d 108 (C.A. D.C., 1963), the appellate court held that the trial court has misconstrued the provisions of Rule 17(b), as it read prior to the 1966 amendments, to require that the averments of the defendant with respect to the expected testimony of proposed witnesses be substantiated by the production of testimonial or documentary evidence. The appellate court held that when the defendant avers facts which, if true, would demonstrate the necessity to the defense of the testimony of the proposed witness and that such testimony is relevant, then the request would not be frivolous and should be granted. 317 F.2d at 110. *See also Washington* v. *Clemmer*, 339 F.2d 715, 718 (C.A. D.C., 1964).

---

[3] The government made available, during the course of the trial, the use of a telephone on a full time basis to enable defense counsel to interview prospective witnesses. (Tr. 1245-51).

[4] Moreover, five of the 65 persons for whom John Wagner requested subpoenas by motion on July 10, 1967, did testify at trial but were not called as defense witnesses for him. (Boyles, Tr. 1880; Dunham, Tr. 997; Gregory, Tr. 824; Potter, Tr. 1787; Nobriga, Tr. 2305).

Obviously, the required showing on the face of an affidavit that a requested witness would be "material to the defense" under former Rule 17(b) is substantially similar to the present requirement of a satisfactory showing by *ex parte* application that "the witness is necessary to an adequate defense." In the final analysis, the trial court must be allowed to deny the issuance of subpoenas under Rule 17(b) when an adequate showing of necessity is not made; otherwise government funds would be unfairly dissipated by frivolous requests for subpoenas.

John Wagner can find no support for his contention in another case that he cites, *Taylor* v. *United States*, 329 F.2d 384 (C.A. 5, 1964). In *Taylor*, the appellate court held that the trial court abused its discretion in denying the request of an indigent defendant who was relying on an insanity defense to subpoena at government expense a psychiatrist who had three years previously committed the defendant as insane, at a time when the defendant had been charged with a similar offense. The appellate court felt that "justice was not quite done. That is our feeling here under the *almost rare facts presented.*" 329 F.2d at 387 (Emphasis added).

In order to bolster his argument that he was prejudiced by a denial of funds and subpoenas, John Wagner frivolously argues that he was prejudiced by the court's denying his request for a continuance of the trial. (J.W. Br. Pt. G) No indication can be found in the record that such motion was even made, much less denied. However, even if it were actually made and denied, such denial would have been a proper exercise of judicial discretion. *See, e.g., Avery* v. *Alabama*, 308 U.S. 444, 446 (1940); *Lemons* v. *United States*, 337 F.2d 619 (C.A. 9, 1964). John Wagner's final trial counsel was appointed by the court approximately 70 days prior to the commencement of the trial, and had ample opportunity to prepare the case, particularly in light of the unusually liberal opportunities for discovery which the defendants herein were granted. Moreover, John Wagner's total reliance on *Stamps* v. *United States*, 387 F.2d 993 (C.A. 8, 1967), the only case cited, is completely misplaced. In that case, upon a com-

plaint issued in September 1966 charging that in June 1966 the defendant willfully concealed a person to prevent his discovery and arrest with knowledge that a warrant had been issued for the person's arrest, the government fully presented its case at a hearing before a commissioner on November 10, 1966, at which time the defendant had an opportunity to cross-examine government witnesses at length. When the complaint was dismissed for insufficient evidence, the United States Attorney notified defendant's attorney that the case would be submitted to the grand jury. An indictment was returned on December 6, 1966; and defendant was arraigned on December 9, 1966. The motion for a continuance was not made until December 14, 1966, the day before trial, and was then denied. The reviewing court held that under the circumstances [which John Wagner fails to mention] the defendant was not prejudiced by allegedly inadequate time for preparation because the witness who the defendant was not able to interview before trial appeared at the first day of trial and was available and did testify in the defendant's behalf.

An examination of the record herein reveals that defendant's demands were unreasonable in both the number of witnesses proposed and the cost involved; that his seeking at least $3,000 in funds to travel, plus the issuance of subpoenas, to interview witnesses and to conduct a pre-trial investigation merely contemplated an attempted fishing expedition which would have involved the useless and abusive issuance of process; that the government afforded all defendants including John Wagner a fair trial by providing broad and extensive pre-trial discovery and by making available witnesses and documents throughout the course of the trial; that the trial court afforded all defendants including John Wagner its cooperation, consideration and fairness in its conduct of the entire proceeding, both before and during the trial; but that John Wagner made no effort to comply with the reasonable requirements of the trial court and of the express language of Rule 17(b) with respect to his obtaining subpoenas. There can be no doubt that the trial court did not abuse its discretion in

denying John Wagner's applications for the issuance of subpoenas at government expense, for government funds, and for the allegedly requested continuance.

POINT SIX

The Claims of Peter Unger and John Wagner of Denial of Due Process of Law and Assistance of Effective and Competent Counsel Are Without Merit

Peter Unger claims that he was denied due process of law in violation of his sixth amendment right to the assistance of counsel by the allegedly ineffective and incompetent representation provided by his court-appointed counsel, Thomas P. Price. (P.U. Br. Pt. F) John Wagner claims that he was prejudiced by the trial court's depriving him of counsel of his own choosing. Additionally, he argues that his court-appointed counsel, Lewis Hampton, was hampered in presenting a defense on his behalf, primarily due to the trial court's denial of funds and subpoenas. (J.W. Br. Pt. D) It is unfortunate that convicted defendants are prone to blame their convictions on the alleged incompetency of counsel, particularly when such counsel is court-appointed.

It is well-established in this Circuit that the assistance of court-appointed counsel is constitutionally inadequate only when the trial record clearly shows that it was so deficient "as to make the trial a farce or a mockery of justice." *Reid* v. *United States*, 334 F.2d 915, 919 (C.A. 9, 1964); *Peek* v. *United States*, 321 F.2d 934, 944 (C.A. 9, 1963); *Stanley* v. *United States*, 239 F.2d 765, 766 (C.A. 9, 1956). In addition to an examination of the record, it is relevant to consider such factors as whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused and adequately investigated the facts and the law; and whether the omissions charged to trial counsel resulted from inadequate preparation rather than from an unwise choice of trial tactics and strategy. *Eubanks* v. *United States*, 336 F.2d 269, 272 (C.A. 9, 1964); *Brubaker* v. *Dickson*, 310 F.2d 30, 32 (C.A. 9, 1962). The requirements of

due process of law and effective assistance of counsel do not demand "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Brubaker* v. *Dickson*, 310 F.2d 30, 37 (C.A. 9, 1962). The mere fact that a defendant is convicted, *De Roche* v. *United States*, 337 F.2d 606, 607 (C.A. 9, 1964); *cf. Mitchell* v. *United States*, 259 F.2d 787, 789 (C.A. D.C., 1958), *cert. denied*, 358 U.S. 850, or the fact that trial counsel was not errorless in every judgment or trial strategy, *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955); *Brubaker* v. *Dickson*, 310 F.2d 30, 37 (C.A. 9, 1962); *MacKenna* v. *Ellis*, 280 F.2d 592, 599 (C.A. 5, 1960), *modified on other grounds*, 289 F.2d 928 (C.A. 5, 1961), is insufficient to show denial of due process. Neither is the time consumed in oral discussion, legal and factual research, and "active" participation in the trial the crucial test of effectiveness of counsel. *De Roche* v. *United States*, 337 F.2d 606, 608 (C.A. 9, 1964); *United States* v. *Wright*, 176 F.2d 376, 379 (C.A. 2, 1949).

Therefore, in determining the propriety of trial counsel's performance, most reviewing courts, not being privy to all the circumstances confronting the advocate in the on-going trial, naturally are reluctant to criticize or second-guess the tactics and strategy he followed in the actual conduct of the trial. *See Tampa* v. *Virginia ex rel. Cunningham*, 331 F.2d 552 (C.A. 4, 1964); *United States ex rel. Weber* v. *Ragen*, 176 F.2d 579 (C.A. 7, 1949), *cert. denied*, 338 U.S. 809. Too often the allegedly defective tactics or strategy may be entirely consistent with effective advocacy, and may have been taken for perfectly proper reasons. Thus, where a questionable action is undertaken for reasons that would appear sound to a competent attorney, the conviction will not be reversed unless the defendant can prove serious prejudice. *See, e.g., Henry* v. *Mississippi*, 379 U.S. 443, 451-52 (1964).

In essence, Peter Unger's complaint that his counsel was incompetent and ineffective is based upon the alleged passiveness and inactivity of counsel during the trial. It is significant to note that in his brief Peter Unger's descrip-

tion of his attorney's representation throughout the proceeding distorts the facts in two material aspects. First, Peter Unger neglects to mention that his attorney, along with all other defense counsel, agreed to the "ground-rule" that a motion or objection by one would be a motion or objection for all defense counsel unless otherwise specified, so that the jury would not be misled or confused by the possible repetition of the same motion or objection by more than one defense counsel to the same matter. (See Tr. 71-73) Peter Unger gives little credence to the fact that before trial his counsel filed various motions on his behalf to obtain a severance of defendants (C.T. 86) and of offenses (C.T. 98), and a change of venue (C.T. 100); participated in each and every pre-trial conference; and was actively involved in discovery procedures. Moreover, during the course of the trial, his counsel made motions and arguments on Peter Unger's behalf for a directed verdict of acquittal at the close of the government's case on direct (Tr. 2269-76), and again after all the evidence had been presented (Tr. 2665). He also moved to strike certain language in the indictment (Tr. 2277; 2383). Second, Peter Unger asserts as an example of incompetent representation that his attorney was so confused that his argument for a directed verdict at the close of the government's case was based on the mistaken assumption that Peter Unger was a defendant in Count XIV instead of Count I. (P.U. Br. at 64) The portion of the transcript which is then quoted to substantiate the allegation of confusion and the conclusion of incompetency is taken completely out of context.[1] When viewed in proper context (Tr. 2271-72), it appears that the attorney's remarks about his client's lack of connection with the conspiracy he was not charged with—*i.e.*, Count XIV—were part of a discussion of his earlier motions for severance and change of venue and were not addressed to his motion for a directed verdict of acquittal. (See Tr. 2269-76)

---

[1] In addition, Peter Unger's brief on appeal erroneously cites page 2664 of the transcript when the attorney's remarks in fact appear on pages 2271-72.

None of the cases cited by Peter Unger are factually relevant to the instant matter. For example, he cites *MacKenna* v. *Ellis*, 280 F.2d 592 (C.A. 5, 1960), *modified on other grounds*, 289 F.2d 928 (C.A. 5, 1961), where the reviewing court found that the defendant was unfairly prevented from presenting his defense in a fair trial by a "combination of circumstances," including the fact that the trial court appointed, over the defendant's protest, two young and inexperienced attorneys just out of law school who had employment applications then pending with the prosecutor's office, and the fact of "the trial court's insensitivity to the need for protecting the defendant from a hasty trial without notice and from the obvious errors of inexperienced appointed counsel." 280 F.2d at 603-604. Here, Peter Unger's court-appointed counsel, Thomas P. Price is an advocate with vast criminal trial experience, including the prosecution of over 130 major felony cases, and with vast civil litigation experience extending over more than ten years of active practice.[2]

An examination of the record similarly demonstrates that John Wagner's claim that the trial court deprived him of his chosen and paid attorney, and thereby denied him his sixth amendment right to counsel, is also spurious. Well in advance of trial, John Wagner's attorney, Robert Bunnett, was specially admitted to the bar of the United States District Court for the District of Oregon on January 25, 1967, and was then informed of the court's rule requiring him to associate with an active member of the bar of the State and of the Court. (Pre-Tr. 5, January 25, 1967) On March 1, 1967, Mr. Bunnett informed the court that he would be assisted by his brother who was associated with him in California, and that the Bunnett brothers proposed to try the entire case for John Wagner and another defendant with the assistance of an inexperienced local attorney. At this point, Chief Judge Solo-

[2] For a full description of the legal experience of Thomas P. Price see the Price Affidavit contained in the Appendix to this brief.

mon advised Mr. Bunnett that local court rules [3] required the local attorney affiliated or associated with outside counsel in a case to participate meaningfully in the trial, and consequently it was suggested that John Wagner obtain a more experienced local counsel to be associated with his out-of-state counsel (Pre-Tr. 4-5, March 1, 1967). In making this suggestion, Chief Judge Solomon was not only complying with the spirit of the local court rule, but was protecting the defendant's right to assistance of effective and competent counsel.

On May 3, 1967, Judge Robert C. Belloni, the trial judge, suggested that the requirement of local counsel might be waived, allowing John Wagner to proceed to trial with counsel of his own choosing. But when the prosecution pointed out that it intended to call Mr. Bunnett as a government witness at the trial, he properly resigned from the case. (Pre-Tr. 3-4, May 3, 1967) [4]

On May 8, 1967, more than two months prior to the commencement of the trial, John Wagner was provided with new court-appointed counsel, Lewis Hampton, allowing ample time for consultation and preparation for trial. (Pre-Tr. 3, May 8, 1967) The record amply demonstrates that the trial court and the government afforded John Wagner and his defense counsel every consideration to assist them with their preparation for trial, including full

---

[3] Section (c) of Rule 4 of the General Rules of the United States District Court for the District of Oregon states that:

> An attorney who is not an active member of the Oregon State Bar but who is a member in good standing of the bar of any other state or of any Court of the United States . . . may, upon oral motion, participate in the conduct of a particular case in this Court, but such motion shall be allowed only if he associates with him an active member in good standing of the Oregon State Bar and of this Court, who shall *meaningfully* participate in the preparation and trial of the case. (Emphasis added)

[4] Mr. Bunnett subsequently was called as a government witness at the trial and testified with respect to his activities as well as to the activities of John Wagner and other defendants during time periods and concerning activities relevant to the charges in the indictment. (Tr. 2007-2020)

and broad pre-trial discovery, frequent opportunities to use government facilities to contact and interview witnesses, and the availability of subpoenas at government expense for defense witnesses upon a reasonable showing that the witnesses were necessary for an adequate defense. Under these circumstances, the contention of John Wagner that his court-appointed counsel failed to present any defense because he was deprived of government funds and subpoenas is totally unfounded.[5]

POINT SEVEN

There Was No Error in the Procedures Followed by the Trial Court in Dealing With the Publicity Aspects of the Trial

All three defendants allege as reversible error the trial court's denial of the motion for mistrial and its failure to poll the jury when it was brought to the attention of the trial court on the second day of trial that two articles in Portland newspapers that morning and the night before were allegedly prejudicial to the defendants. (J.W. Br. Pt. B; P.U. Br. Pts. C and D; R.W. Br. Pt. IV A)

The determination of whether the defendants received a fair trial, including an impartially and uninfluenced decision by the trier of fact, *In re Murchison*, 349 U.S. 133, 136 (1955), involves an examination and evaluation of the interaction between the nature and extent of the pub-

---

[5] *See* POINT FIVE, *supra*. The further allegation that the trial court's failure to appoint counsel for the corporate defendants, Golden Rule and GRR, also deprived John Wagner of his right to counsel are equally without merit. John Wagner was named in all counts in the indictment. The evidence convincingly established that John Wagner, admittedly the alter-ego of Golden Rule and GRR, was the driving force behind the implementation of the fraudulent scheme through these corporate vehicles. Consequently, all evidence introduced against the corporate defendants was, *a fortiori*, admissible against him. Furthermore, even after the corporations were dismissed from the trial as defendants, the jury was not precluded from finding that the corporations, acting through their agents, were co-conspirators, with the result that any corporate activities in furtherance of the conspiracy were properly admissible against John Wagner. *See Cornes* v. *United States*, 119 F.2d 127, 129 (C.A. 9, 1941).

licity, the number of actual or potential jurors aware of and exposed to possibly prejudicial information, and the extent to which the trial court *and* the defendants availed themselves of procedural safeguards. *Silverthorne* v. *United States*, 400 F.2d 627, 630 (C.A. 9, 1968). A consideration of these factors in light of prior determinations by many appellate courts, including the Supreme Court, in similar circumstances clearly demonstrates that there was no prejudice whatever to the defendants from the relatively little publicity about the case that did in fact appear in Portland newspapers before and during the trial, and that the trial court's frequent and strong admonitions to the jury, commencing even before the 12 jurors and 4 alternates were ultimately empanelled and continuing throughout the trial, were more than adequate to avoid or significantly to minimize even the possibility that prejudice might infect the jury's decision. In light of these factors, and the important consideration which must be given to the discretion of the trial judge, the one disinterested party most familiar with the local situation and all the circumstances of the trial, *see Dosek* v. *United States*, . . . F.2d . . . (C.A. 8, No. 19,103, Dec. 30, 1968); *Marshall* v. *United States*, 355 F.2d 999, 1007 (C.A. 9, 1966), *cert. denied*, 385 U.S. 815, it is submitted that the defendants were afforded a fair trial free from prejudicial extraneous influences at every stage of the proceeding.

During a pre-trial conference on March 30, 1967, Chief Judge Solomon, in discussing the question of publicity with both the government and the defense, pointed out that "this case has been singularly free of publicity in the last six or eight months," and wisely admonished all counsel to carefully refrain from generating publicity. (Pre-Tr. 2840, March 30, 1967) That counsel followed the Chief Judge's admonition, and that the case continued to be relatively free of publicity, are demonstrated by the fact that only three articles concerning any aspect of the case were published in Portland newspapers during the period from March 30 until the commencement of the trial. (J.W.

Br. Exs. 6-9) These three articles, all appearing on inside pages, were largely factual accounts of proceedings against some of the defendants, involving the Hollywood Towne House foreclosure, and were devoid of any inflammatory or sensational matter.

In this atmosphere free from even remotely prejudicial publicity, the trial court and counsel for the government and the defense undertook the selection of the jury on July 18, 1967. In conducting its voir dire of the talesman, using the so-called "Arizona Plan," [1] the trial court thoroughly examined the two veniremen who, in response to the trial court's inquiries about exposure to publicity about the defendants or the case, had indicated that they had read or heard something about the case. (Venireman Buhrle, Pre-Tr. 29, July 18, 1967; Venireman O'Conner, Pre-Tr. 31, July 18, 1967). Even before the final selection of the 12 jurors and 4 alternates, the trial court informed the 30 veniremen that "this may be a well-publicized case," and forcefully added, "I ask you to fastidiously avoid newspaper articles, those of you who are finally selected, relative to this case, keeping in mind that you will have presented to you all of the evidence needed to decide this case." (Pre-Tr. 37, July 18, 1967) After peremptory challenges were exercised, at which time the two veniremen who had indicated their exposure to publicity were excused (Pre-Tr. 48, July 18, 1967), no defense counsel exercised any challenges for cause. (Pre-Tr. 48, July 18, 1967) Before administration of the oath to the jurors, the trial court asked each counsel if he were satisfied with the 12 jurors and 4 alternates, and, without requesting or submitting further questions to supplement the trial court's voir dire or raising any challenge to the final composition of the jury, each counsel expressly indicated his satisfaction. (Pre-Tr. 48-49, July 18, 1967)

---

[1] In *Silverthorne* v. *United States*, 400 F.2d 627 (C.A. 9, 1968), this Court did *not* hold that a trial court's en masse voir dire examination of the panel was improper in the ordinary case, but there held that the trial court had abused its discretion in not allowing polling of the jurors on voir dire "under the peculiar and difficult facts of this case." 400 F.2d at 640.

None of the cases cited by defendants to support the contention that the trial court erred in not individually questioning the veniremen with respect to exposure to publicity are apposite to the pre-trial circumstances of the instant case, characterized by the freedom from little, let alone prejudicial publicity. All of the cases cited by defendants which considered the adequacy and effectiveness of the methods and procedures followed by the trial court in the selection of the jury are characterized by the trial court's apparent disregard of the defendant's right to a fair trial in light of the massive and intensive pre-trial publicity.

Thus, in *Irvin* v. *Doud*, 366 U.S. 717 (1961), where "a barrage of newspaper headlines, articles, cartoons, and pictures was unleashed against [the defendant] during the six or seven months preceding his trial," 366 U.S. at 725, including publication of police press releases stating that he had confessed, 268 of the 430 veniremen were excused for cause as having fixed opinions as to the defendant's guilt, and 8 of the 12 jurors finally selected admitted that they thought the defendant was guilty but indicated that they could render an impartial verdict.

In *Rideau* v. *Louisana*, 373 U.S. 723 (1963), where a filmed twenty-minute "interview" of the defendant's confessing in detail to the sheriff in the jail was repeatedly broadcast over a local television station for three days, three members of the jury stated on voir dire that they had seen or heard the "interview," and two members of the jury were local deputy sheriffs. After defense counsel had exhausted all peremptory challenges, the trial court denied defense counsel's request that five veniremen be excused for cause.

In the landmark case of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the massive news coverage by all media during the entire pre-trial period contained virulent and incriminating publicity about the defendant and the murder, making the defendant "infamous" and the case "notorious." The media frequently aired charges and countercharges besides those for which the defendant was tried.

384 U.S. at 354. When 75 veniremen were called 25 days before trial, all 3 local papers published their names and addresses, resulting in their receiving "anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution." 384 U.S. at 342. Every juror, except one, testified at voir dire to reading about the case in newspapers or to having heard broadcasts about it. 384 U.S. at 345. Despite this atmosphere of extensive, flagrant, inflammatory and intense publicity, the trial court refused to take any precautions against the influence of pre-trial publicity.

In the recent case of *Silverthorne* v. *United States*, 400 F.2d 630 (C.A. 9, 1968), where local newspaper and national magazine articles and extensive radio and television coverage "saturated" the local area with voluminous and sensational publicity about the defendant and all aspects of his private and public life, 400 F.2d at 631, every one of the 65 veniremen summoned admitted a knowledge of the case; and of the 43 panelists excused, 19 had expressed an opinion as to the defendant's guilt from what they had read in newspapers and seen or heard on news broadcasts. 400 F.2d at 635. The trial court in *Silverthorne*, denying that any prejudice existed because of the pre-trial publicity, denied defense counsel's request at the close of the first day's voir dire to examine the jurors individually, and continued to conduct a general and superficial voir dire examination of the prospective jurors.

As Justice Holmes astutely observed, "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States*, 218 U.S. 245, 251 (1910). Therefore, it is well-established that the trial court has broad discretion in determining whether the effect of pre-trial publicity has diminished to the point where it no longer affects the defendants right to a fair trial by an impartial jury. *See, e.g., Beck* v. *Washington*, 369 U.S. 541, 556 (1962); *Beck* v. *United States*, 298 F.2d 622, 629 (C.A. 9, 1962), *cert. denied*, 370 U.S. 919. *See also Stroble* v. *California*, 343 U.S. 181, 192 (1952).

Moreover, the manner in which the trial court conducts the voir dire examination of prospective jurors will not be interferred with by a reviewing court unless there has been a clear abuse of discretion. *E.g.*, *Silverthorne* v. *United States*, 400 F.2d at 638. Under the pre-trial circumstances of the instant case, the trial court's manner of conducting the voir dire of the talesmen was well within its discretion. Furthermore, it is submitted that the failure of defense counsel to submit further questions to supplement the trial court's voir dire, to request individual examinations of the veniremen, to make any challenges for cause, or to challenge in any way the final composition of the 12 jurors and 4 alternates who ultimately convicted the defendants constituted a waiver of any objection based upon pre-trial publicity. *Beck* v. *Washington*, 369 U.S. at 558; *United States* v. *Ragland*, 375 F.2d 471, 475 (C.A. 2, 1967), *cert. denied*, 390 U.S. 925 (1968); *Fabian* v. *United States*, 358 F.2d 187, 191 (C.A. 8, 1966).

With respect to publicity during the trial, the trial court exercised great care to prevent the jury's exposure to any extraneous influences, and to dispel or significantly minimize the possibility of any prejudice, from the minimal and largely factual publicity that did arise. Thus, in addition to its strong admonition to the veniremen before the final selection of the jury to avoid any publicity that might occur (Pre-Tr. 37, July 18, 1967), the trial court again instructed the jury at the very beginning of trial on that same day to

> Fastidiously avoid any broadcasts and newspaper accounts of the trial. You need not feel that you will get valuable information from those sources that you won't get here, because you will recall again that this is sworn testimony, and information from the outside would only be detrimental to a fair evaluation of this case. (Tr. 4)

and then concluded that first day's session by cautioning the jury, "Please do not discuss the case, and remember the admonitions I have given you." (Tr. 9)

Defense counsel brought to the attention of the trial court, out of the presence of the jury on the second day of trial, July 19, 1967, two articles which appeared in Portland newspapers the night before and that morning,[2] and moved for a mistrial, and, in the alternative, for individual polling of the jurors, on the ground that the publicity was allegedly so prejudicial that the defendants were deprived of a fair trial. (Tr. 13-15) Both articles appeared on inside pages, were captioned by not unusually large or suggestive headlines, factually reported the commencement of the trial, and accurately recited the allegations of the indictment. Each article made a short, one-sentence reference to the outstanding perjury indictment against John Wagner and Christensen; one article expressly identified them, while the other article omitted their names. The trial court then collectively examined the jurors to determine whether they had been exposed to the newspaper publicity.[3] After learning that no juror had read or discussed either of the articles, the trial court denied the motion for mistrial by then continuing the proceeding. (See Tr. 16) Significantly, although defense counsel never

---

[2] One article, "6 Men, 3 Firms on Trial Here In Multimillion Realty Fraud," appeared on page 5 of the July 18, 1967 evening edition of the Oregon Journal. (J.W. Br. Ex. 10) The "rewrite" of the other article, "Trial Opens for Six Men Accused in Mortgage, Securities Fraud Scheme," appeared on page 15 of the July 19, 1967 late morning edition of the Oregonian. (J.W. Br. Ex. 11) The Oregonian "morgue" did not contain the early morning edition's article which was brought to the trial court's attention because it was substantially identical to the later appearing "rewrite" article. The inaccurate reference to this article in John Wagner's brief as appearing on July 10, 1967 is presumably a typographical error. (J.W. Br. Ex. 11)

[3] Ladies and Gentlemen of the jury, the Portland press, as was expected, did publish some matters concerning this case. There is nothing wrong with that in and of itself. However, the articles were not entirely accurate, and had you read them and believed them, it would be a matter unfairly prejudicial to some of the defendants in this case. Of course, I have asked you not to read them, but I do want to know whether any of you did? (No response.) All right. Then I assume that none of you have read the articles or none of them have been discussed in detail by you or your husbands or other family members or any other persons. If this isn't the case, please let me know. (No response.) (Tr. 18-19)

again brought the fact of publicity to its attention, the trial court thereafter frequently and strongly admonished the jurors not to read, see or listen to any publicity, specifically including newspaper reports, relating to the case.[4]

---

[4] At the close of the afternoon session, that second day:

> Many people believe that when a Judge tells the jury not to read newspapers, that the first thing they do is rush out and start reading them. I don't believe that is true. I don't believe it is true, because you didn't the last time and because you took the oath to try this case fairly, and you are not going to rush out to read the newspapers.
>
> Now, I am not critical of the newspapers. I have no reason to be critical. They write the truth as they see it. . . . Therefore, there are going to be some inaccuracies, and if those inaccuracies are read by you people, they will not serve the cause of justice. Somebody will be treated unfairly. That is not sworn testimony, and it is fine for a purpose. But the purpose isn't evidence in this case. So make a studious effort, if you will, and I ask you again to avoid reading or listening to conversations or news broadcasts about this case. (Tr. 191-93)

At the close of the afternoon session, fourth day:

> Continue your practice, if you will, Ladies and Gentlemen, of avoiding publicity on this case. (Tr. 726)

At the close of the afternoon session, eighth day:

> Ladies and Gentlemen, you will be excused until tomorrow morning at 9 o'clock. Please do not discuss the case or form an opinion, and please avoid press accounts and broadcast accounts of the trial. You are excused. (Tr. 1642)

At the close of the afternoon session, ninth day:

> Ladies and Gentlemen, we stand in recess until 9 o'clock Monday morning. I will ask you again to please, as you have been, refrain from discussing the case or reading newspaper accounts or any broadcasts or any communication from anybody about this case. Please do not form an opinion at this time. (Tr. 1816)

At the close of the afternoon session, eleventh day:

> Please avoid newspaper accounts of the trial and avoid television and radio broadcasts. Please do not discuss the case nor form any opinion. (Tr. 2094)

At the close of the final afternoon session, thirteenth day, after all the evidence had been presented and before the trial court's charging the jury the next morning:

> Please do not discuss the case, either among yourselves or with anyone else. Please do not read the public press. It is no reflection on the press to tell you that it would be prejudicial

Moreover, whatever newspaper publicity that did arise during the rest of the trial consisted of routine news articles appearing on inside pages and containing factual accounts of what had transpired at trial.

The assessment and evaluation of the nature and possible effect of the possible exposure of jurors to prejudicial information, and the determination of what procedural safeguards should be followed to accord defendants a fair trial free from extraneous influences is a matter committed to the sound discretion of the trial court under the special facts of each case. *E.g.*, *Marshall* v. *United States*, 360 U.S. 310, 312 (1959); *Cohen* v. *United States*, 297 F.2d 760, 764 (C.A. 9, 1962), *cert. denied*, 369 U.S. 865. Where pre-trial publicity has been minimal, factual and devoid of any sensational or inflammatory matter, and the trial court's admonitions to the jurors have been repeated and emphatic, as here, in the absence of a strong showing of *actual* prejudice resulting from a juror's reading, seeing or hearing the offending information, reviewing courts will *not* presume that the jurors have disregarded the trial court's instructions. *E.g.*, *Silverthorne* v. *United States*, 400 F.2d at 641; *Beck* v. *United States*, 298 F.2d 622, 629 (C.A. 9, 1962), *cert. denied*, 370 U.S. 919; *Cohen* v. *United States*, 297 F.2d 760 (C.A. 9, 1962), *cert. denied*, 369 U.S. 865. Consequently, reviewing courts are reluctant, without compelling and exceptional reasons, to substitute their judgments for that of the trial court, which has had better opportunity to observe and evaluate the jurors and the local atmosphere, as reflected in the news media, at the time and place of trial. *E.g.*, *Marshall* v. *United States*, 355 F.2d 999, 1006 (C.A. 9, 1966), *cert. denied*, 385 U.S. 815; *see Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Silverthorne* v. *United States*, 400 F.2d 627

---

to one or more or perhaps all parties of this case for you to read it. It is not written for the same reason that the testimony is given here. It is not required that they write with the technical accuracies necessary in a trial of the case. Therefore, just simply avoid newspaper accounts or broadcast accounts of the trial until it is all over. Then perhaps maybe your husbands or wives will save them for you, and you can read them then. (Tr. 2680-81)

(C.A. 9, 1968); *Yates* v. *United States*, 225 F.2d 146 (C.A. 9, 1955), *reversed on other grounds*, 354 U.S. 298 (1957).

The facts and circumstances of the instant case do not even remotely resemble those found by reviewing courts in the cases cited by the defendants to substantiate the contention that the trial court erred in denying the motion for mistrial and in failing to individually poll the jurors with respect to their exposure to the two newspaper articles brought to the court's attention on the second day of trial. Almost all of the cases cited by defendants involved so massive and voluminous a deluge of virulent, inflammatory and sensational publicity, often by all mass communications media, both before and during the trial that the reviewing courts felt compelled, without requiring a showing of actual jury exposure to the publicity, to presume that the defendants were prejudiced by such widespread and offensive publicity.

Thus, in *Coppedge* v. *United States*, 272 F.2d 504 (C.A. D.C., 1959), *reversed on other grounds*, 369 U.S. 438 (1962), in the presence of the jury, a witness refused to take the stand and be sworn. Out of the presence of the jury, the witness' counsel advised the court that his client refused to testify out of fear of the defendant because he had seen the defendant violently assault his brother. The prosecutor corroborated the witness' fear and observed that the defendant was a "vicious criminal." Both area newspapers published accounts of this incident, and one also stated that the defendant was then incarcerated for assaulting the witness' brother and quoted the trial court as saying that neither the prosecutor nor the police could guarantee protection of the witness. When the defense presented the articles to it, the trial court asked the jurors collectivey whether any of them had read either of the articles. Despite the fact that 4 regular jurors and one alternate juror indicated their exposure to the prejudicial publicity, the trial court denied the defense request to interrogate the jurors individually when the jurors, by their silence to the trial court's inquiry, indicated to the trial

court that they could ignore the articles. Significantly, the trial court had not specifically admonished the jurors prior to this incident to avoid exposure to publicity, and it made no reference to the matter in its final instructions. Finding the trial court's general and very brief inquiry of the jury as a whole inadequate, the reviewing court held that the nature of the articles and the actual reading of them by members of the jury required a careful individual examination of the jurors involved as to the possible effect of the articles. 272 F.2d at 507. The reviewing court, however, recognized that:

> *This was not a case in which a juror merely read in a newspaper a factual account of what had transpired in the courtroom in his presence.* These articles—properly enough from the newspaper's point of view—contained additional facts, facts which the jurors were not entitled to know about the defendant, and which were devastating to his cause. 272 F.2d at 508 (Emphasis added).[5]

In *United States* v. *Accardo*, 298 F.2d 133 (C.A. 7, 1962), the reviewing court held that the general nature of the trial court's admonitions at the beginning of trial, its failure to call the jurors attention frequently and specifically to the possibility of prejudicial newspaper publicity, and its assumption of the effectiveness of its general instructions were inadequate to protect the defendant from

[5] Similarly, in *Mares* v. *United States*, 383 F.2d 805 (C.A. 10, 1967), a case cited by the defendants which did not involve voluminous publicity before or during the trial, a newspaper article appearing under "a bold and prominent headline" reading "Robbery Confession Admission Denied" reported the trial court's ruling, out of the presence of the jury, that testimony of defendants' withdrawn guilty pleas and admissions of complicity in the crime was inadmissible. In addition to reporting the trial court's statements inexactly and out of context, and subjectively observing that the trial court's decision was "obviously reluctant" and "apologetic," the article quoted the trial court as saying that it "was regretful when true facts have to be omitted." 383 F.2d at 807. The appellate court reversed the conviction and remanded for a new trial on the ground that the trial court erred in making no attempt at all to determine whether the jurors had been exposed to the extremely prejudicial publicity. 383 F.2d at 809.

massive and intensely prejudicial newspaper publicity which continued throughout the almost nine week trial. At each step of the proceedings, the public was bombarded with "flaming headlines" in newspapers, captioning articles which depicted the defendant as a notorious criminal associated with "syndicate hoodlums" who "had beaten" 14 detailed charges over more than 25 years and which compared the defendant's trial with Al Capone's trial 29 years before, further characterizing the defendant as a "jet-age Capone." The television and radio reporting of the trial was equally vivid and sensational. Despite frequent defense requests to question the jurors individually about exposure to this widespread, inflammatory and devastating publicity, the trial court only questioned the jury generally, and when one juror did admit she had seen a headline, the trial court did not privately inquire in detail about her exposure or about any possible prejudicial effect. In reversing the conviction, the reviewing court pointed out that "*under the 'special facts' of this case*, we conclude that the rulings failed to provide adequate precautionary measures in aid of defendant's right to a fair trial." 298 F.2d at 136 (Emphasis added).

In *Estes* v. *Texas*, 381 U.S. 532 (1965), massive pretrial publicity had given the defendant and the case national notoriety, and four jurors empanelled at trial had seen and heard all or part of a highly publicized 2-day pretrial hearing in which the trial court denied defense motions for a continuance based on pre-trial publicity and for an order preventing radio and television broadcasts and news photography during the trial. Also, film-clips, videotapes and "live" coverage were broadcast on news programs during the trial. The Supreme Court found that the trial court's procedures involved such a probability of prejudice that the trial was inherently lacking in due process, and reversed the conviction. In finding that the case was one of those instances in which a showing of actual prejudice is not a prerequisite to reversal, the Court did however observe that "It is true that in most cases involving claims of due process deprivations we re-

quire a showing of identifiable prejudice to the accused." 381 U.S. at 542.

In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), where the massive, virulent and incriminating pre-trial publicity continued unabated during the trial, the flagrant and intense publicity was brought to the trial court's attention, but it took no action to insulate the jurors from it or from the "carnival" and "Roman holiday" atmosphere of the trial. 384 U.S. at 345, 353, 356-58. As the trial progressed, the newspaper summarized and interpreted the evidence, and often drew unwarranted inferences from the testimony and even from material which was never heard from the witness stand. The trial court did collectively examine the jurors once, and two jurors admitted hearing highly inflammatory matters, but the trial court refused to take any precautions to protect the jurors or witnesses from hounding by news media and exposure to sensational and inflammatory publicity, or to control the release of leads, information and gossip to the news media by police officers, witnesses, and counsel for both sides. In reversing the conviction, the Supreme Court found that actual prejudice had infected the jury and the trial. 384 U.S. at 357.

In *Silverthorne* v. *United States*, 400 F.2d 627 (C.A. 9, 1968), there was no doubt that the jurors were exposed to the voluminous and sensational publicity about the case and the defendant and all aspects of his private and public life which had saturated the local area not only in local newspaper and national magazine articles but also on radio and television broadcasts for almost a year between the time of the bank failure and the trial. When the bailiff informed the trial court that one juror had collected all the newspaper articles relating to the trial in the jury-room and that the jurors were reading them there, the trial court denied a motion to prohibit that inherently prejudicial practice, and denied frequent defense motions for mistrial without ascertaining by individual questioning of the jurors whether any of them had been reading the publicity and what effect such exposure had on them.

After examining the vast and clearly prejudicial publicity surrounding every aspect of the trial, this Court reluctantly stated that:

> We have no recourse, in light of this incident [newspaper articles in the juryroom], but to lay the ordinary assumption aside and to attribute little if any weight to the court's repetitive admonitions that the jurors should read or hear nothing about the case. 400 F.2d at 641.

and concluded that:

> Our evaluation of the publicity surrounding appellant's trial and the methods and procedures adopted by the trial court with respect thereto, compel the conclusion that appellant was not accorded a fair trial, free from prejudice or, as the more recent cases require, free from the probability of prejudice. 400 F.2d at 630.

Despite John Wagner's preposterous assertion that he was the Don Silverthorne of Portland, and his bold implications that he was also treated as unfairly as a Dr. Sam Sheppard, a Billy Sol Estes or a Tony Accardo, the record establishes that he was a relatively unknown conspirator who began exploiting victims in the tiny village of Elsinore and who, along with his co-defendants, victimized property holders throughout the West, until they were justly and fairly convicted for their misdeeds. An examination of what transpired in the instant case clearly demonstrates the total absence of the inherently prejudicial publicity read, seen or heard by the jurors in *Coppedge*, *Accardo*, *Estes*, *Sheppard* and *Silverthorne*. In striking contrast to the offensive circumstances found in the cases cited by defendants, there was no showing made in the instant case that any juror was exposed to the infrequent and factual publicity which preceded the trial or which arose during the trial. In further contrast, the trial court repeatedly gave strong, specific admonitions to the jurors, commencing at the very time they were being empanelled and extending throughout the trial, to assure

that the defendants would not be prejudiced from news coverage of the case. When the two new articles were brought to its attention, the trial court wisely exercised its discretion in not polling each juror, after the jury's collective negative responses to his inquiries, for to do so may well have prejudiced the defendants by calling the jurors' attention to the articles to which they had not been exposed, and by "incit[ing] their joint or individual curiosity and encourag[ing] attempts to read the very newspaper articles sought to be kept from their knowledge." *Silverthorne*, 400 F.2d at 641, 643. Thereafter, the trial court continued to forcefully and frequently admonish the jury to avoid exposure to any newspaper, radio or television publicity about the case, thereby dispelling and significantly minimizing the possibility that publicity would infect the proceeding and deprive the defendants of a fair trial. The record overwhelmingly establishes that the methods and procedures adopted by the trial court assured the defendants a fair trial free from prejudicial extraneous influences. Their patently speculative conjecture that the jurors *must* have been exposed to prejudicial publicity is spurious. *Beck* v. *Washington*, 369 U.S. at 558; *Fabian* v. *United States*, 358 F.2d 187, 191 (C.A. 8, 1966).

POINT EIGHT

Statements Made by Peter Unger to F.B.I. Agents and a Deposition of John Wagner Were Properly Admitted Into Evidence

A. *Peter Unger's Statements to F.B.I. Agents Were Properly Admitted*

Peter Unger claims that the trial court erred in admitting into evidence his pre-indictment statements to two F.B.I. agents because he had not been given in *haec verba* the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and asserts that his court-appointed counsel's

failure to object to the testimony of the agents should not be construed as a waiver because of his counsel's alleged incompetency. (P.U. Br. Pt. I) However, the record demonstrates that the warnings given to Peter Unger prior to any questioning sufficiently apprised him of his constitutional rights, and that he was fully aware at all times that he could avail himself of his constitutional privileges, including his right to counsel. The now-challenged testimony of the two F.B.I. agents was based on agent McCloskey's two interviews with Peter Unger at the F.B.I. office in Las Vegas on May 17, 1966 and June 1, 1966, and on agent Neves' interview with him in Peter Unger's own apartment in Roseville, California on August 29, 1966.[1]

Agents McCloskey and Neves both testified that on each occasion that they interviewed Peter Unger, he was advised of his constitutional rights. (Tr. 1584, 1590, 1602) The F.B.I. memorandum of the May 17, 1966 interview indicates that Peter Unger appeared voluntarily in the F.B.I. offices in Las Vegas and was warned by agent McCloskey that

> he need furnish no information before consulting with an attorney of his own choice, that any information he did furnish could be used against him in a court of law, and that any information he did furnish is considered free and voluntary on his part.

The memorandum of the June 1, 1966 interview indicates that Peter Unger again voluntarily appeared at the

---

[1] On July 27, 1967, the government lodged with the Clerk of the Court for purposes of the record in this case the memoranda of these interviews contemporaneously executed by the two agents, copies of which had therefore been provided to all defense counsel. *See* Affidavit of Alice Stordahl Russell in the Appendix. The trial record mistakenly reflects the date of the first McCloskey interview as November 17, 1966. Apparently counsel for the government incorporated this wrong date in his questioning of McCloskey (Tr. 1584), but McCloskey's memoranda of interviews substantiate that the first interview was actually conducted on May 17, 1966. Subsequent questioning of McCloskey in the trial record bears this out. (Tr. 1590)

F.B.I.'s office in Las Vegas, where agent McCloskey similarly advised him in almost identical terms, at the very outset that

> he need furnish no information of any kind before consulting with an attorney of his own choice, that any information he did furnish could be used against him in a court of law, and that any information he did furnish is considered free and voluntary on his part.

and that Peter Unger then advised McCloskey that "he wished to continue to cooperate in this matter, that he did not need an attorney, . . ."

The memorandum of the August 29, 1966 interview which was conducted in his own apartment indicates that Peter Unger was furnished at the very outset with the following statement of "YOUR RIGHTS":

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any question, and to have him with you during questioning. You have this right to advice and presence of a lawyer even if you can not afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

and that he then signed the following "WAIVER":

> I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

The record further reveals that during the pre-trial hearing of May 25, 1967, the trial court raised the question of the voluntariness of any admissions that the government could introduce at trial, and stated:

> If any issue of the voluntariness should arise, I ask that the defendant whose admission is anticipated in evidence will make a request that the hearing be held at an early date. If after a full disclosure by the Government of whatever admissions the Government intends to introduce, then I would feel that the onus is upon the defendants' attorney to request an advance hearing if there is a question of voluntariness of those admissions. (Pre-Tr. 7-8, May 25, 1967)

Also during that proceeding, the government informed the trial court that all admissions that the government might intend to use, including depositions taken of and statements made by defendants, had been given or made available to the defendants at that time, and that if there were other admissions, they too would be turned over. (Pre-Tr. 24, May 25, 1967) This representation by the government was confirmed by Peter Unger's attorney at the outset of his cross-examination of agent McCloskey when he stated for the record and for the jury's edification that the government had given him copies of the memoranda McCloskey was referring to "well in advance of these interviews." (Tr. 1600)

Even if the warnings had been deficient, which they plainly were not, any objection to the receipt into evidence of the statements made to the F.B.I. agents was waived since defense counsel had been provided well in advance of trial with copies of the F.B.I. memoranda, had failed to make any pre-trial objections in accordance with the procedures set down by the trial court, and had failed at the trial to object to the testimony or to the adequacy of the foundation laid for its admission.

It is significant to note that both McCloskey interviews occurred prior to the Supreme Court's landmark *Miranda* decision on June 13, 1966, and that at the post *Miranda*

interview by Neves, Peter Unger was given a full "Miranda-type" warning in writing. Obviously, these interviews of Peter Unger were non-custodial interrogations which did not restrict his freedom of action in any significant way, *see Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and any information he did furnish and any statements he did make were voluntary acts and clearly not induced by stealth, trickery or misrepresentation. *See, e.g., Kohatsu* v. *United States*, 351 F.2d 898, 902 (C.A. 9, 1965), *cert. denied*, 384 U.S. 1011 (1966); *United States* v. *Sclafani*, 265 F.2d 408, 414-15 (C.A. 2, 1959), *cert. denied*, 360 U.S. 918. The warnings later espoused by *Miranda* and subsequent cases to be given to "suspects" during a "custodial" interrogation do not vitiate the fact that Peter Unger was adequately warned and aware of his constitutional rights during the first two interviews. The third interview by Neves occurred subsequent to the *Miranda* decision. Significantly, this interview took place in Peter Unger's own apartment, away from the coercive atmosphere and influences of the custodial interrogations condemned by *Miranda* and subsequent cases. *See Dosek* v. *United States*, ... F.2d ..... (C.A. 8, No. 19,103, Dec. 30, 1968). *Compare Mathis* v. *United States*, 391 U.S. 1 (1968), *with White* v. *United States*, 395 F.2d 170 (C.A. 8, 1968), *petition for cert. filed sub nom., Kubik* v. *United States*, 4 Crim. L. Rptr. 4020 (Oct. 2, 1968) (No. 309) *and Kohatsu* v. *United States*, 351 F.2d 892 (C.A. 9, 1965), *cert. denied*, 384 U.S. 1011. Under the circumstances, it would be incredulous to find that Peter Unger was "in custody" at the time of the interviews; however, even if he had been, the warnings given would have satisfied the requirements of *Miranda* and later decisions.

The cases cited by Peter Unger do not support a contrary conclusion. *Mathis* v. *United States*, 391 U.S. 1 (1968), was a "custody" case where the defendant was in jail when he was questioned and was given no warning whatsoever. Neither *Chapman* v. *California*, 386 U.S. 18 (1967), nor *Carnley* v. *Cochran*, 369 U.S. 506 (1962),

dealt with the "warnings" question. The recent decision of *White* v. *United States*, 395 F.2d 170 (C.A. 8, 1968), *petition for cert. filed sub nom., Kubik* v. *United States*, 4 Crim. L. Rptr. 4020 (Oct. 2, 1968) (No. 309), rather than supporting Peter Unger's factually weak claim, clearly demonstrates that statements of a defendant to a government agent are admissible where the disclosures are entirely voluntary and were not induced by custodial interrogation, or by coercion, fraud or misrepresentations, but were made in familiar surroundings when the agent was making a conscientious effort to inform the defendant of the purpose of his questions. 395 F.2d at 174-75.

Peter Unger's assertion that his court-appointed counsel's failure to object to the admission of his statements should not be treated as a waiver because of that counsel's incompetency is frivolous and is not borne out by the record.[2]

B. *John Wagner Was Not Prejudiced by the Admission Into Evidence of Peter Unger's Statements.*

John Wagner claims that he was so severely prejudiced by the trial court's admission into evidence of Peter Unger's statements to government agents, purportedly incriminating him, that the trial court's limiting instructions to the jury did not cure the prejudice. (J.W. Br. Pt. J) After each of the two agents testified on direct examination with respect to their interviews with Peter Unger, and before cross-examination of each agent, the trial court instructed the jury not to consider the testimony of that witness as evidence against either John Wagner, Robert Wagner, or the other defendants then in the case. (Tr. 1599, 1607) John Wagner's attorney did not cross-examine either agent. However, John Wagner's attorney did cross-examine Peter Unger when he later took the stand and testified in his own behalf. (Tr. 2364-70)

---

[2] *See* POINT SIX, *supra.*

An examination of all the evidence introduced at trial clearly demonstrates that the government's case against John Wagner was substantial.[3] The likelihood that those parts of Peter Unger's statements which mentioned John Wagner added significantly to the weight of the government's case against John Wagner or prejudiced him in the eyes of the jury is minimal. Moreover, whatever insignificant effect these statements may have had was obviated and dispelled by the trial court's limiting instruction and its subsequent charge to the jury (Tr. 1599, 1606-07), and by the crucial fact that Peter Unger took the stand, thereby affording John Wagner the opportunity to confront and cross-examine him with respect to the statements. *See Bruton* v. *United States*, 391 U.S. 123 (1968); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *United States* v. *Levinson*, ____ F.2d ____ (C.A. 6, Nos. 18204 et seq., Dec. 30, 1968); *Santoro* v. *United States*, ____ F.2d ____ (C.A. 9, 1968).

C. *The Deposition of John Wagner Was Properly Admitted*

John Wagner claims that the trial court erred in admitting into evidence portions of his deposition "in the collateral civil matter" after he had objected to the introduction on the ground that he had not been properly advised of his constitutional rights. (J.W. Br. Pt. H) The deposition was obtained on May 4 and 5, 1966 pursuant to a subpoena duces tecum issued in connection with the Hollywood Towne House foreclosure proceeding filed on March 17, 1966. *United States* v. *Hollywood Towne House* (D.Ore., 66 Civ. 160). When John Wagner, accompanied by his attorney Robert Bunnett, appeared at the United States Courthouse in Portland, he was first duly sworn and then, prior to any questioning, he was advised in the presence of his attorney by the Assistant United States Attorney, as follows:

---

[3] *See* POINT ONE, *supra.*

Mr. ROSE: Before I proceed, I would like to give you one further warning. As you know, *you are here with Counsel,* and under the Constitution *you have the right to refuse to answer any question you might feel incriminating from a personal standpoint,* and I believe, *Counsel, you have probably advised your client along these lines?*

Mr. BUNNETT: Yes.

Mr. ROSE: So it is not necessary for me to go into any length about that, so *if there is any time you want to refuse to answer feel free to do so.*

(Tr. 2159-60) (Emphasis added)

It is submitted that in light of the adequate warning given to John Wagner by Mr. Rose on the record in the presence of his attorney Mr. Bunnett, coupled with John Wagner's silence when Mr. Bunnett acknowledged that he had also warned John Wagner of his rights, it would be preposterous to believe John Wagner's subsequent claim of ignorance that in reality he did not understand and was not told by Mr. Bunnett that his testimony could be used against him.

POINT NINE

The Trial Court Did Not Err in Informing the Jury of the Nolo Contendere Pleas of Several Defendants

John Wagner alone claims that it was error for the trial court to have informed the jury that defendants Christensen and Jongeward had pleaded nolo contendere to the charges against them during the course of the trial (J.W. Br. Pt. M), and that the trial court's cautionary instructions did not cure the prejudicial effect of the remarks. Moreover, he argues that he was also prejudiced by the fact that a newspaper article commented on Christensen's nolo plea by stating, "Judge Robert C. Belloni explained that the plea could have the same effect as a guilty plea" (See J.W. Br. Ex. 23), whether or not a juror had read the article, because "it is safe to assume that they probably knew or considered Nolo as the equiv-

alent of guilty." (J.W. Br. at 72-73) These two contentions are without merit when considered in light of the facts of the trial and the existing case law.

A review of the record clearly discloses that the trial court, from the very first day of the trial, cautioned and admonished the jury that not only the pleas of nolo contendere by some defendants but also the dismissals against other defendants had no bearing whatsoever on the guilt or innocence of the remaining defendants, and that the jury was to determine the guilt or innocence of each of the remaining defendants solely upon consideration of the evidence introduced at trial.[1]

During the second week of trial, out of the presence of the jury, Christensen entered a plea of nolo contendere. The trial court accepted the plea and informed the defendants and their counsel that it intended to inform the jurors of the fact that Christensen had entered a nolo plea, and to instruct them that this plea had no bearing on the guilt or innocence of the other defendants. (Tr. 1341) The trial court invited comments by counsel as to whether this was an improper instruction, but received no comment. The jurors were then recalled and instructed as follows:

> Ladies and Gentlemen, Mr. Colman Christensen has entered a plea of nolo contendere in this case as to all counts against him. He is no longer in the case for any purpose. The other five defendants and three corporate defendants are still in the case. *This action by Mr. Christensen and this plea has no bearing whatsoever upon the guilt or innocence of any of the other defendants in the trial which will proceed with them as parties, but leaving Mr. Christensen completely out of the case.* (Tr. 1342-43) (Emphasis added)

This same situation occurred during the subsequent course of the trial when Jongeward, out of the presence

[1] Prior to the trial, the indictment was dismissed against Shubin, and Stewart entered a plea of nolo contendere. (Tr. 5-6)

of the jury, entered a plea of nolo contendere. The trial court then informed the jurors of this occurrence and instructed them as follows:

> Ladies and Gentlemen of the jury, Mr. Gordon Jongeward, the Defendant Gordon Jongeward, has entered a plea of nolo contendere in this case to all of the charges against him, Counts 1 through 14, with the exception of Count 12 which was dismissed. So he is no longer in this case. *This action by this defendant has no bearing whatsoever and is not to be considered by you in evaluating either the guilt or the innocence of any other defendant in this case.* (Tr. 1778) (Emphasis added)

After closing arguments on August 3, 1967, out of the presence of the jury, the trial court heard "last claims." With respect to instructing the jurors about the dismissals of the three corporate defendants, the trial court stated it would tell them: "It is simply not a matter to be considered. There are only three defendants in this case, and they are sitting out there. And whatever happened to the others, whether they were guilty pleas, nolo pleas, dismissals, or any other reason, has no bearing upon their guilt or innocence." (Tr. 2677) No objections were made by defense counsel to the proposed instruction.

On August 4, 1967, in discussing the proposed jury instructions, the trial court urged defense counsel to "complain freely if you dispute" the substance or the legal accuracy of any of the instructions. The trial court then stated, "I make a point out of the fact . . . that nolo contendere pleas have been entered, which means nothing to this jury . . . ." (Tr. 2684) Defense counsel made no comments and took no exceptions to the proposal either then or after the instruction was delivered to the jury. The instruction read as follows:

> The three defendants are charged here as three individuals, and the guilt or innocence of each defendant must be passed upon by you separately pursuant to and in accordance with my instructions. You are

> to determine the guilt or innocence of these defendants from evidence before you. You are not called upon to return a verdict as to the innocence or the guilt of any other person or persons, so if the evidence convinces you beyond a reasonable doubt of the guilt of the defendants, or any of them, you should so find, even if you believe one or more other persons also are guilty.
>
> As I told you during this trial, Alvin R. Stewart, Colman Carl Christensen, and Gordon Z. Jongeward have entered pleas of nolo contendere to certain counts in the indictment. The fact that they have entered pleas does not necessarily mean that they alone are responsible for the crimes charged in the Indictments, nor does it necessarily mean that each or any of the other defendants is guilty. Guilt or innocence of the defendants who are on trial must be determined by you solely on the evidence introduced at this trial. (Tr. 2720-21)

The trial court's accurate and informative explanations and instructions to the jury, as set out above, were both proper and necessary because of the number of defendants in the case, the length of the indictment and the fact that it was taken into the jury room during the deliberations, and the participation and appearance of several defendants in the courtroom after they no longer were defendants in the trial. Under these circumstances, the unexplained and sudden absence from the case and the courtroom of one or more of the named or participating defendants would surely and inevitably have raised great curiosity, and perhaps confusion, in the minds of the jurors. *See Nemec* v. *United States*, 178 F.2d 656, 661 (C.A. 9, 1949). Thus, rather than prejudicing the remaining defendants, the trial court's numerous instructions kept the issues and the remaining defendants in proper focus and prevented the jury from unwarranted speculation and improper influence-drawing about the disappearances from the case. *See United States* v. *Aronson*, 319 F.2d 48, 50-51 (C.A. 2, 1963), *cert. denied* 375 U.S. 920; *Nemec* v. *United States*, 178 F.2d at 661.

While the government has been unable to find any appellate decisions involving the propriety of informing the jury of a nolo contendere plea of a co-defendant, the cases are legion that it is proper for the trial court to inform the jury of a co-defendant's guilty plea with proper cautionary instructions.[2] *A fortiori*, these cases are determinative here. In *Davenport* v. *United States*, 260 F.2d 591 (C.A. 9, 1958) *cert. denied*, 359 U.S. 909 (1959), two of seven defendants pleaded guilty during the course of the trial of a multi-count indictment. With respect to the first defendant's plea, the court stated to the jury:

> We are not going to try Mr. Errion here any longer. He has pleaded guilty. He is safely in jail. I think we have all we can do to try the other six defendants that are here without discussing Mr. Errion any further. 260 F.2d at 595.

In its final instructions to the jury the court stated, "The pleas of Errion and Montgomery are no evidence of the guilt of any of the defendants nor evidence that a crime was committed." 260 F.2d at 596. This Court found no error in these instructions.

Similarly, in *Wood* v. *United States*, 279 F.2d 359 (C.A. 8, 1960), two of the nine defendants withdrew their pleas of not guilty and entered pleas of guilty before trial, and three more did so during the trial. The court affirmed the trial court's denial of a motion for mistrial based upon the pleas of guilty and the trial court's advising the jury of the guilty pleas, and approved the following instruction to the jury by the trial court:

> I want to tell you again the fact that such pleas were entered does not mean that the remaining three defendants on trial . . . are guilty with them. The pleas are not evidence to the defendants remaining

---

[2] *See, e.g., United States* v. *Light*, 394 F.2d 908 (C.A. 2, 1968); *United States* v. *Aronson*, 319 F.2d 48 (C.A. 2, 1963), *cert. denied*, 375 U.S. 920; *Wood* v. *United States*, 279 F.2d 359 (C.A. 8, 1960); *Davenport* v. *United States*, 260 F.2d 591 (C.A. 9, 1958), *cert. denied*, 359 U.S. 909 (1959); *Nemec* v. *United States*, 178 F.2d 656 (C.A. 9, 1949).

> on trial that they are guilty, or the crime charged in the indictment was committed.
>
> These pleas do not give rise to any inference as to the guilt or innocence of the defendants here on trial. The guilt or innocence of the defendants still on trial must be determined solely by you, solely by the evidence introduced in the trial of this case. 279 F.2d at 362.

Thus, it is well-settled that it is not error, if proper cautionary instructions are given, for the trial court to inform the jury that one or more co-defendants have entered pleas of guilty. Here, the trial court's meticulous efforts by cautionary instructions and admonitions to inform the jury of the issues to be determined by them and to keep the remaining defendants in proper focus conformed both adequately and accurately to the instructions approved by this and other appellate courts in similar circumstances.[3] Furthermore, when the trial court informed the defendants and their counsel, out of the presence of the jury, of his intention to instruct the jury in connection with Christensen's plea of nolo contendere (Tr. 1391), there were no objections or exceptions taken to the proposed instruction. It submitted that there was no criticism then, and there can be no criticism now, because the trial court's instructions were entirely proper.

The further argument by John Wagner that he was prejudiced by the statement in the newspaper, purportedly quoting Judge Belloni's comment regarding Christensen's nolo plea, has no merit. The newspaper account simply states that the judge explained that a nolo plea could have the same effect as a guilty plea. The plea of nolo contendere has long been recognized in the federal courts, *United States* v. *Norris*, 281 U.S. 619 (1929); *Hudson* v. *United States*, 272 U.S. 451 (1926), and appellate courts have long held that a plea of nolo contendere has the same effect as a plea of guilty with respect to

---

[3] See *United States* v. *Light*, 394 F.2d 908, 914-15 (C.A. 2, 1968), and cases cited therein.

the case in which it is entered. *Tseung Chu* v. *Cornell*, 247 F.2d 929 (C.A. 9, 1957), *cert. denied*, 355 U.S. 892; *Bell* v. *C.I.R.*, 320 F.2d 953 (C.A. 8, 1963); *United States* v. *Consentino*, 191 F.2d 574 (C.A. 7, 1951). There is nothing in the record which even remotely suggests that any juror read the article cited by counsel. Moreover, assuming *arguendo* that a juror had read the article, John Wagner has failed to demonstrate that he was prejudiced.

POINT TEN

The Remaining Allegations of Error Are Unfounded

The defendants also raise as error the following additional points: (A) That under Count I of the indictment the government attempted to prove many separate conspiracies, rather than the single conspiracy alleged (P.U. Br. Pt. G); (B) That the prosecuting attorney in his closing argument alluded to the outstanding perjury indictment against John Wagner (J.W. Br. Pt. I); and (C) That the court erred in excluding testimony of Robert Wagner bearing upon his "state of mind" (R.W. Br. Pt. D). These additional allegations of error are without merit.

A. *A Single Conspiracy Was Alleged and Proven in Count I*

Peter Unger's claim that each overt act or each property transaction covered in Count I constituted, at best, a separate conspiracy is unfounded. The fact that multiple substantive crimes were undertaken and committed by the defendants and that different defendants played varying roles and performed diverse functions in the scheme did not make the single, over-all conspiracy to defraud property holders a multiple conspiracy since there was a common purpose underlying the separate exchange transactions, the identical objective was being pursued in each instance, and there was concerted action by the defendants to achieve such purpose and objective, *i.e.*, obtaining real and personal property in exchange for worthless

paper. *See, e.g., Blumenthal* v. *United States*, 332 U.S. 539 (1947); *Hayes* v. *United States*, 329 F.2d 209 (C.A. 8, 1964); *Isaacs* v. *United States*, 301 F.2d 706 (C.A. 8, 1962), *cert. denied*, 371 U.S. 818. The mere fact that the defendants utilized "a multiplicity of ways and means of action and procedure . . . such that it would involve the commission of more than one criminal offense," did not transform their scheme into multiple conspiracies. *Weiss* v. *United States*, 122 F.2d 675, 680-81, (C.A. 5, 1941), *cert. denied*, 314 U.S. 687. *See also United States* v. *MacAlpine*, 129 F.2d 737, 739 (C.A. 7, 1942).

B. *There Was no Reference to the Perjury Indictment in the Summation by the Government*

Although John Wagner "assured his counsel" that the Assistant United States Attorney alluded in his summation to the outstanding perjury indictment against him, the record accurately reflects that no such reference was made. (Tr. 2-74, August 3, 1967) This false assurance to his counsel on this appeal further demonstrates John Wagner's duplicity.

C. *There Was no Error in the Trial Court's Refusal to Allow Robert Wagner to Testify to Self-Serving, Hearsay Declarations*

Robert Wagner argues that he should have been allowed to testify to a conversation that he had with a Mr. Peter McAtee at the Albuquerque Hotel, in August 1966, in order to establish his "state of mind" so that the jury could find that he was not knowingly engaged in the conspiracy charged. If any such conversation in fact occurred, and if it were relevant to Robert Wagner's defense of good faith, then Mr. McAtee should have been called as a witness to testify to it.

The case relied upon by Robert Wagner, *United States* v. *Anost*, 356 F.2d 413 (C.A. 7, 1966), is inapposite. In *Anost*, the defendants were convicted of knowingly possessing and transporting in interstate commerce certain

stolen goods. The crucial issue of the case was whether the defendants knew that the goods they received from other parties were stolen. The trial court excluded from evidence testimony by the defendants that a third party hired them to transport the goods, but did not tell them anything that would have put them on notice that the goods were stolen. The appellate court found that the trial court's rejection of the offered evidence deprived the defendants of the opportunity to establish a good faith defense, and consequently reversed the convictions.

In the instant case, Robert Wagner was *not* denied the opportunity to prove an alleged good faith defense to the conspiracy charge for which he was convicted. He testified himself, and called several witnesses to testify on his behalf. The issue of his good faith was squarely presented to the jury not only by Robert Wagner's testimony and that of his defense witnesses, but also by the trial court in its charge to the jury (*see, e.g.*, Tr. 2760-61). The evidence of Robert Wagner's conspiratorial activities, *aliunde* any of his activities at the Albuquerque Hotel, was substantial. Nothing in the record even remotely suggests that Mr. McAtee was privy to any aspects of the conspiracy alleged in Count I; consequently, nothing Robert Wagner discussed with Mr. McAtee could possibly be relevant to his good faith defense that he was not participating in a scheme to defraud with the other defendants. Furthermore, even if the trial court's refusal to allow Robert Wagner to testify to irrelevant or cumulative hearsay in an attempt to show the jury his "state of mind" constituted error, at best it would be harmless in light of the independant overwhelming evidence of guilt in the record.

CONCLUSION

The government respectfully requests that this Court affirm the verdicts of guilty returned by the jury against defendants John Wagner, Peter Unger and Robert Wagner.

SIDNEY I. LEZAK,
United States Attorney

Of Counsel:

JOHN N. FEGAN,
ARTHUR F. MATHEWS,
BURTON H. FINKELSTEIN,
DAVID J. LEVENSON,
Attorneys,

United States Securities and Exchange Commission,
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Appellee was furnished by mail to Edmund B. Schultz, Esq., P.O. Box 445, 1630 Newell Avenue, Walnut Creek, California 94597, and Willard F. Jones, Esq., One Grand Rio Circle, Sacramento, California 95826, attorneys for John C. Wagner; to Joseph E. O'Connor, Esq., P.O. Box 6252, San Diego, California 92106, attorney for Peter C. Unger; to Barry J. Freeman, Esq., 100 West Monroe Street, Chicago, Illinois 60603, attorney for Robert L. Wagner, this ..... day of January, 1969.

SIDNEY I. LEZAK,
United States Attorney

By: ARTHUR F. MATHEWS
Of Counsel for Appellee

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 331037 427